TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 256.

THE RELIEF FIRE-INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

ELIJAH A. SHAW.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED DECEMBER 9, 1874.

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1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Elijah A. Shaw, of Boston, in the district and commonwealth of Massachusetts, plaintiff, and the Relief Fire-Insurance Company, a body-corporate under the laws of the State of New York, defendant, in an action of contract, a manifest error hath happened, to the great damage of the said Relief Fire-Insurance Company, as by its complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the thirtieth day of September, in the year of our Lord one thousand eight hundred and seventy-four.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—

JOHN LOWELL,
U. S. Dist. Judge.

2 Circuit court of the United States, district of Massachusetts, *ss:*

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this tenth day of October, A. D. 1874.

[SEAL.] JOHN G. STETSON, *Clerk.*

The defendant in error hereby acknowledges due and sufficient service of the foregoing writ of error, and of a citation thereon entitling said writ of error to be entered in the Supreme Court of the United States, at the October term thereof, A. D. 1874.

HODGES & BARRETT,
Attorneys for Defendant in Error.

3 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Friday the fifteenth day of May, in the year of our Lord one thousand eight hundred and seventy-four.

Before the honorable Nathan Clifford, associate justice:

ELIJAH A. SHAW, OF BOSTON, IN THE DISTRICT AND COMMONWEALTH OF MASSACHUSETTS, plaintiff,
v.
THE RELIEF FIRE INSURANCE COMPANY, A body-corporate under the laws of the State of New York, and doing business in
4 said commonwealth, and having in Boston, in said commonwealth, a general agent, to wit, one William H. Whitcomb, defendant. } In an action of contract.

This cause was removed from the supreme judicial court of the commonwealth of Massachusetts, and was entered in this circuit court at the May term thereof, A. D. 1873, when, to wit, May 15, 1873, the following copies, attested by the clerk of said supreme judicial court, were filed, namely:

(Copy.)

COMMONWEALTH OF MASSACHUSETTS.
Suffolk, ss:

To the sheriffs of our several counties, or their deputies, greeting:

We command you to attach the goods or estate of the Relief
5 Fire-Insurance Company, a body-corporate under the laws of the State of New York, and doing business in the said commonwealth of Massachusetts, and having in Boston, in said commonwealth, a general agent, to wit, one William H. Whit comb, to the value of six thousand dollars, summon the said defendant (if it may be found in your precinct) to appear before our justices of our supreme judicial court next to be holden at Boston, within and for our said county of Suffolk, on the first Tuesday of April next, then and there in our said court to answer unto Elijah A. Shaw, of said Boston, in an action of contract, to the damage of the said plaintiff (as it says) the sum of six thousand dollars, which shall then and there be made to appear, with other due damages.

And have you there this writ, with your doings therein.

Witness Reuben A. Chapman, esquire, at Boston, the seventeenth day of March, in the year of our Lord one thousand eight hundred and seventy-three.

6 GEO. C. WILDE,
Clerk.

A true copy. Attest:
GEO. C. WILDE, *Clerk.*

COUNTY OF SUFFOLK, *ss:*

I, Jon. F. Barrett, on behalf of the plaintiff, in this writ, before the

service thereof, on oath declare that the matter sought to be recovered in the action hereby commenced actually equals in amount or value the sum of four thousand dollars.

JON. F. BARRETT.

Subscribed and sworn to this seventeenth day of March, A D. 1873, before me.

WILLIAM STANDISH,
Justice of the Peace.

SUFFOLK, *ss :* BOSTON, *March* 18, 1873.

By virtue hereof, I this day attached a ship as the property of the within-named Relief Fire-Insurance Company, and summoned it
7 to appear and answer at court, by giving in hand an attested copy of this writ and a summons to William H. Whitcomb, agent of said company.

BENJ. F. BAYLEY,
Depy. Sheriff.

Ser. & travel, 1.08; copy 1.00—2.08.

(Endorsement:) No. 1231. Elijah A. Shaw, pltff. The Relief Fire-Insurance Co., deft. Entry April t. 1873. From the office of Hodgers & Barrett. T. F. Nutter, for deft.

(Copy.)

Supreme jud. court, April term, 1873.

SUFFOLK, *ss :*

E. A. SHAW
v.
THE RELIEF FIRE-INS. CO. OF NEW YORK.

Declaration.

And the plaintiff says the defendants made an agreement with
8 the plaintiff, whereby they agreed to insure him, against loss or damage by fire, to the amount of five thousand dollars, for the period of one month from the fifteenth day of October, eighteen hundred and seventy-two, on the plaintiff's stock of boots and shoes contained in said Boston and occupied by M. A. Ball; and said stock of boots and shoes, while contained in said store, was totally destroyed by a fire that occurred on the ninth and tenth days of November, in said year. And the plaintiff gave the defendants due notice of said loss and furnished to them proof of the same, and of the cash value of said stock of boots and shoes at the time of said loss. And the defendants were bound by said agreement to pay to the plaintiff the amount of said loss, and the defendants owe the plaintiff the sum of five thousand dollars and interest thereon.

By his attys., HODGES & BARRETT.

A true copy—attest:
GEO. C. WILDE, *Clerk.*

9 (Copy.)

Supreme judicial court, April term, 1873.

SUFFOLK, *ss:*

ELIJAH A. SHAW
v.
THE RELIEF FIRE-INSURANCE CO.

And now comes the defendant, The Relief Fire-Insurance Company of New York, by James H. Pinkney, its president, and said Pinkney, on oath says, that the plaintiff in the above-entitled cause is described as of Boston, in the State of Massachusetts; that the defendant is of the city of New York; that the matter in dispute exceeds the sum of five hundred dollars, and he has reason to believe and does believe that from prejudice or local influence the defendant will not be able to obtain justice in this court. Wherefore said defendant prays that said cause may be removed into the next circuit court of the United States to be held in this district.

J. H. PINKNEY.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

Subscribed and sworn to before me this 24th day of April, 1873.

[SEAL.] FRANCIS P. BURKE,
Commissioner for the Commonwealth of Massachusetts in New York.

10 A true copy—attest:
GEO. C. WILDE, *Clerk.*

(Copy.)

Know all men by these presents that we, The Relief Fire-Insurance Company of the city of New York, as principal, and James H. Pinkney, of the city of New York, and Wm. H. Whitcomb, of Boston, and Thomas F. Nutter, of said Boston, as sureties, are holden and stand firmly bound unto Elijah A. Shaw, of Boston, in the county of Suffolk, in the full and just sum of five hundred dollars, to be paid to the said Shaw, his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this twenty-second day of April, A. D. 1873.

The condition of this obligation is such that whereas the above-
11 named Elijah A. Shaw has commenced an action in the supreme judicial court for the county of Suffolk, by writ dated March 17th, 1873, and returnable to the April term of said court, against the said Relief Fire-Insurance Company, and whereas the said defendant has entered an appearance to answer to said action, and has filed a petition for the removal of said cause into the circuit court of the United States at the term to be next held in the district of Massachusetts:

Now, therefore, if the said Relief Fire-Insurance Company shall enter in the said circuit court on the first day of the term next to be held as aforesaid, copies of the process against them in said cause, and shall also then and there appear and enter special bail in the cause, if special bail were originally requisite therein according to the law and practice

of the United States and its courts in such cases, then this obliga-
12 tion shall be void; otherwise in full force and virtue.

RELIEF FIRE-INS. CO. [SEAL.]
J. H. PINKNEY,
Of New York, President.
J. H. PINKNEY. [SEAL.]
WM. H. WHITCOMB. [SEAL.]
THOMAS F. NUTTER.

STATE OF NEW YORK,
County of New York, ss:

I, Francis P. Burke, a commissioner for the commonwealth of Massachusetts, residing at New York, in the county and State of New York, do certify that on the 22nd day of April, in the year 1873, the above-named Jas. H. Pinkney, as prest. of the Relief Fire-Ins. Co., of New York, and Jas. H. Pinkney, personally appeared before me, at New York, in the county and State aforesaid, and acknowledged the foregoing instrument by him signed to be his free act and deed, and that he, as prest., executed the within by and with authority of the board of directors of said company, and that the seal of said co. affixed to this instru-
13 ment was so affixed by him with and by like authority.

In witness whereof I have hereto set my hand and affixed my official seal, at New York, in the county and State of New York, this 22d day of April, in the year 1873.

FRANCIS P. BURKE, [SEAL.]
Commissioner for the Commonwealth of Massachusetts.

Supreme judicial court, April term, 1873.

SUFFOLK, *ss:*

This bond accepted by the court.

GEO. C. WILDE, *Clerk.*

April 25th, 1873.

A true copy—attest:
GEO. C. WILDE, *Clerk.*

Upon the entry of said cause in this circuit court the parties appeared, by their respective attorneys. On the fourth day of June, A. D. 1873, the following answer was filed, namely:

14 *Defendant's answer.*

The defendant, for answer to plaintiff's writ and declaration, denies each and every allegation therein contained.

And, further answering, defendant denies that it ever made any agreement with the plaintiff whereby it agreed to insure him against loss or damage by fire to the amount of five thousand dollars, or any other amount, for the period of one month from October 15th, 1872, or for any other period, on plaintiff's stock of goods in store numbered seventy-five, in Pearl street, in Boston; and it denies that it owes the plaintiff the sum of five thousand dollars and interest thereon, or that it was or is bound by any agreement to pay the plaintiff the amount of any loss by fire, as set forth in his declaration, because it says no such agreement or contract was ever made or entered into.

By

T. F. NUTTER,
Counsel for Defendant.

15 This cause was thence continued to the October term of this court, A. D. 1873, when, to wit, December 4th, 1873, the following amended declaration was filed by leave of court, namely:

Amended declaration.

And the plaintiff says that the defendants, at Boston, in the commonwealth of Massachusetts, made an agreement with the plaintiff, whereby, in consideration of a premium at the rate of sixty one hundredths per cent. per annum, which the plaintiff promised to pay to the defendants on demand, the defendants agreed to insure him against loss or damage by fire to the amount of five thousand dollars, for the period of one month, from the fifteenth day of October, eighteen hundred and seventy-two, on the plaintiff's stocks of boots and shoes, contained and to be contained in the brick store numbered 75 Pearl street, in said Boston, occupied by M. A. Ball. And said stock of boots and shoes,
16 while contained in said store, was totally destroyed by a fire that occurred on the 9th and 10th days of November, in the year 1872. And the plaintiffs gave the defendants due notice of said loss, and furnished to them proofs of the same, and of the cash-value of said stock at the time of said loss, which exceeded the sum of five thousand dollars; and the defendants were bound by said agreement to pay to the plaintiff the amount of said loss, and the defendants owe the plaintiff the sum of five thousand dollars and interest thereon.

By his attorneys, HODGES & BARRETT.

This cause thereupon came on to be heard before the honorable John Lowell, district judge, holding said court, and a jury, and, after a full hearing, was committed to a jury sworn according to law to try the issue, who, after hearing all matters and things concerning the same,
17 return their verdict, and upon oath say:

The jury find for plaintiff, and assess damages in the sum of five thousand two hundred and forty-one dollars.

On the eleventh day of March, A. D. 1874, the plaintiff files the following motion to amend declaration, which is allowed by the court, after verdict, as of date of bill of exceptions in this cause, namely:

Motion to amend declaration.

And now, after verdict for the plaintiff in the above-entitled cause, but before judgment, the plaintiff comes and asks leave to amend his declaration by filing the following additional count, to wit:

"Also the plaintiff says the defendant, at said Boston, on the 15th day of October, in the year 1872, made an agreement with the plaintiff, whereby, in consideration of a premium at the rate of sixty hun-
18 dredths ($\frac{60}{100}$) per cent. per annum, which the plaintiff promised to pay the defendants on demand, they agreed to insure him against loss or damage by fire to the amount of five thousand dollars on the plaintiff's stock of boots and shoes, contained and to be contained in the brick store numbered 75 on Pearl street, in said Boston, and occupied by H. A. Ball, for the period of one month from said 15th of October, and if said goods remained in said store for more than one month then until said goods were shipped. And said stock of boots and shoes, while contained in said store, was, on the 9th and 10th days of November, in the year 1872, destroyed by fire, and the plaintiff gave the defendants due notice and furnished to them proof of said loss, and

of the cost-value of said stock of goods at the time of said loss, which the plaintiff avers exceeded the sum of five thousand dollars.

And the defendants were bound by said agreement to pay to the plaintiff the amount of said loss; and the defendants owe the
19 plaintiff the sum of five thousand dollars and interest thereon.

E. A. SHAW,
By his attys., HODGES & BARRETT.

This cause was thence continued for judgment to this present term. And now, to wit, September 26th, 1874, it is considered by the court that the said Elijah A. Shaw, plaintiff, recover of the said Relief Fire-Insurance Company of New York the sum of five thousand four hundred and ninenty-two and fifty-seven cents damages,
20 and his costs of suit, taxed at . Upon the trial of the said cause, after the evidence was closed on both sides, and before the issue was submitted to the jury, the said Relief Fire-Insurance Company filed their bill of exceptions, which was sealed and allowed by the court, and is in the words and figures following, namely:

Circuit court of the United States, district of Massachusetts, October term, A. D. 1873.

ELIJAH A. SHAW
vs.
THE RELIEF FIRE-INSURANCE COMPANY.

Bill of exceptions.

Be it remembered that this cause came on for trial at the October term of said circuit court, A. D. 1873, before the honorable John Lowell, district judge, and before a jury empanelled for that purpose. It was an action of contract, brought by the plaintiff, a citizen of Massachusetts, against the defendants, a corporation established under
21 chapter 466 of the general laws of the State of New York for the year 1853, and to make insurance on the stock-principal against loss and damage by fire. The action was commenced before and returned into the supreme court of Massachusetts, and removed by the defendants to this court, according to law. The action is brought to recover for a loss by fire on the 9th of November, 1872, under an alleged contract of insurance made by the defendant corporation with the plaintiff in the State of Massachusetts, on the 15th of October, 1872. The plaintiff, at the trial, claimed only to recover upon the amended count of his declaration, said amended count being the only one read to the jury by the plaintiff. The defendants filed their answer denying that they ever made the contract alleged in the amended count. Said amended count and answer are made a part of this bill of exceptions.

The plaintiff then offered a copy of the defendants' charter, hereto annexed, marked "Exhibit A," and the copies duly certified, so as to constitute the same sufficient evidence of the defendants appoint-
22 ment, prior to October 15th, 1872, of Edwin B. Dow as their general agent under the laws of Massachusetts, and evidence tending to show that he held such office at that date, and of their appointment of William H. Whitcomb as their general agent under said laws, on the 21st of October, 1872, to succeed the said Dow, which copies are hereto annexed, marked "Exhibits B and E." It was admitted by plaintiff that said Dow was, during the period of his general agency, the only

agent of this company in this branch in Massachusetts authorized to make insurance on the' account. The following testimony was then offered, as per Exhibit D and Exhibit E, being a copy of the memorandum or entry make on said Dow's books, refer'ed to in his testimony. The defendants presented to the court the following prayers for instructions before the case was argued:

1st. That there is no evidence in this case to authorize the jury to find that the defendants ever authorized the agent appointed by them in Massachusetts, Edwin B. Dow, to delegate his authority to
23 another person to make contracts of insurance in behalf of and binding on the defendants.

2nd. That there is no evidence in this case to authorize the jury to find that any contract of insurance was ever made with the plaintiff by the defendants or by any agent empowered to bind them by such contract.

3rd. That there is no evidence in this case to authorize the jury to find that the agent of defendants, Dow, by whom the contract of insurance declared on is claimed to have been made, ever had authority to make a contract of insurance in behalf of the defendants except in writing, or that such agent was ever held out to the world or those dealing with him by the defendants as having any authority to bind them except by a written contract.

4th. That there is no evidence in this case to authorize the jury to find that the agent by whom the contract of insurance is claimed to have been made had any power to bind the defendants to a contract of insurance, until the premium therefor was paid, or that they ever
24 held such agent out to the world or those dealing with him as having any such power to bind them before the premium was paid.

5th. That, upon the facts in this case, the defendants had no legal power to make an oral insurance.

6th. That there is no evidence in this case to authorize the jury to find a verdict for the plaintiff.

In reference to the first prayer the court instructed the jury as requested, but also instructed them that the agent, Dow, by virtue of his power as general agent, could employ clerks and assistants, and any act done by Dow's clerk, with his knowledge and approval, or subsequent ratification, was Dow's act; and in reference to all the other prayers for instructions refused to give them.

Upon the argument of the case by the plaintiff's counsel, he claimed that if the jury should be satisfied that the contract between the
25 plaintiff and defendant's agent was that the plaintiff's merchandize should be insured for one month and as long after that as it should remain in the place where it was insured before it was shipped, without any reference to any particular time after said month, and that the contract was to insure such merchandize as might be in the place of insurance to the extent of five thousand dollars, that he was entitled to a verdict.

Thereupon the defendants requested the court to instruct the jury as follows:

1st. If the jury shall be satisfied that the contract made between the plaintiff and defendants was that the merchandise of plaintiff should be insured until it was shipped from the place where it was insured, if it remained there for more than one month, then the plaintiff is not entitled to recover.

2nd. If the jury are satisfied that the contract of insurance

26 made between plaintiff and defendants was for the insurance of such an amount of merchandize, not exceeding five thousand dollars, as might be stored at Ball's by the plaintiff, and that it was not for five thousand dollars absolutely, but only for the value of the merchandise so stored, then the plaintiff cannot recover.

The court declined to give either instruction.

The court instructed the jury as follows, among other instructions not objected to:

That the defendants, notwithstanding their charter, had the power to make contracts of insurance, not in writing, like that relied on by the plaintiff, which looked to a policy to be thereupon issued, and that there was evidence authorizing the jury to find that the agent, Dow, had power to make such contracts, not in writing, to bind said defendants, and also to find such agent had authority to bind the defendants by such oral contract before the payment of a premium, that is, to give credit for the premium; and that there was also evidence to au-

27 thorize the finding by the jury that the contract of insurance claimed to be made by the defendants and sued on in this case was made by an agent having authority to make such contract in their behalf, and, further, there was evidence authorizing the jury to find for the plaintiff; that it was a question of fact whether the contract declared on by the plaintiff was in fact made by the defendants' agent, and if the jury were satisfied such contract was made, then the plaintiff was entitled to their verdict, if the other facts of his case were proved.

To the refusal of the presiding judge to give the instructions prayed for by the defendants, the defendants excepted before the jury retired from by the bar.

And to the instructions given by the presiding judge the defendants excepted before the jury retired from the bar.

The jury thereupon returned their verdict as follows:

The jury find for plaintiff and assess damages in the sum of five thousand two hundred and forty-one dollars, ($5,241.00.)

LEONARD DOWNING,
Foreman.

28 Which verdict was duly recorded.

The defendants thereupon requested that their exceptions might be signed and sealed, and inasmuch as the matters herein set forth do not appear in the record, the same have been reduced to writing, and being found to be correct, this bill of exceptions is allowed by the court and directed to be filed as of the eighth day of December, A. D. 1873, before the jury left the bar.

JOHN LOWELL, [SEAL.]
District Judge.

29 EXHIBIT A.

Charter and by-laws of the Relief Fire-Insurance Company. Commenced business Dec. 16, 1855. New York: H. Anstice & Co., stationers, 23 Nassau street. 1872.

30 NOTICE.

The subscribers hereby give notice that they intend to form a company for the purpose of transacting the business of insurance, as expressed in the first section of the act of the legislature of the State of New York, entitled "An act to provide for the incorporation of fire-insurance companies," passed June 25th, 1853.

That the name of said company is to be "The Relief Fire-Insurance Company," and is to be located in the city of New York.
Dated New York, September 10, 1855.

Benjamin H. Field, No. 127 Water street.
John H. Macy, firm of Josiah Macy's Sons.
Chauncey D. Hurd, firm of J. W. Schulten & Hurd.
James S. Petrie, firm of J. & A. Petrie & Co.
J. S. De Agreda, firm of De Agreda, Jove & Co.
Frederic De Peyster, 69 Wall street.
George Warren, firm of Crocker & Warren.
Frederick W. Reimer, firm of Reimer & Mecke.
Reuben W. Howes, firm of Howes, Hyatt & Co.
Charles Illius, 74 Beaver street.
James Irwin, firm of Tracy, Irwin & Co.
Henry A. Wilmerding, firm of Wilmerding, Hoguet & Humbert.
Gideon Pott, firm of Mitchell & Pott.
Archibald T. Finn, 171 Water street.
William C. Barrett, firm of Barrett & Brinsmade.
Francis Brown, firm of Wilson & Brown.
John McKesson, firm of McKesson & Robbins.
Robert T. Haws, 8 South William street.
Henry W. Belcher, firm of Sackett, Belcher & Co.
Francis Tomes, jr., firm of Francis Tomes & Sons.
Arent S. De Peyster, 164 Maiden Lane.
James L. Todd, firm of Converse, Todd & Co.
Cornelius A. Berrian, firm of J. & C. Berrian.
Walker P. Jones, 143 Water street.
Henry Anstice, firm of Henry Anstice & Co.
John T. B. Maxwell, 77 South street.
Isaac Green Pearson, 10 Wall street.
James H. Pinkney, 65 Wall street.

31 1855.

A. S. DE PEYSTER, *President.*
I. GREEN PEARSON, *Vice-President.*
J. H. PINKNEY, *Secretary.*

32 *Charter of the Relief Fire-Insurance Company.*

ARTICLE I.

The name of this company shall be the "Relief Fire-Insurance Company." The principal office for the transaction of its business shall be located in the city of New York. Its purpose and business shall be by instrument, under seal or otherwise—

To make insurance on dwelling houses, stores, and all other kinds of buildings, and upon household furniture, or other property, against loss or damage by fire, and to effect re-insurance of any risks taken by them.

ARTICLE II.

The amount of capital to be employed in the transaction of its
33 business shall be $150,000, (one hundred and fifty thousand dollars,) which shall be divided into three thousand shares of $50 each, with privilege to increase the said capital stock to $300,000, (three hundred thousand dollars.)

ARTICLE III.

The corporate powers of this company shall be exercised by a board of directors, a majority of whom shall be citizens of this State, and each director shall be a stockholder of at least $500 of the capital stock of this company. The first board of directors shall be, viz, Benjamin H. Field, John H. Macy, Chauncey D. Hurd, James S. Petrie, J. S. de Agreda, Frederic de Peyster, George Warren, Frederick W. Reimer, Reuben W. Howes, Charles Illius, James Irwin, Henry A. Wilmerding, Gideon Pott, Archibald T. Finn, William C. Barrett, Francis Brown, John McKesson, Robert T. Haws, Henry W. Belcher, Francis Tomes, jr., Arent S. de Peyster, James L. Todd, Cornelius A. Berrian, Walker P. Jones, Henry Anstice, John T. B. Maxwell, Isaac Green Pearson, James H. Pinkney; and shall hold their offices until others, as hereinafter provided for, shall be elected in their stead.

ARTICLE IV.

The said board of directors, immediately after the company
34 shall be by law authorized to commence business, and the directors thereafter to be chosen as soon as may be after each annual election, shall, by a majority of the votes of the members of the board of directors, convened at a meeting thereof, choose one of their number to be president of said company, who shall hold his office until his successor shall be elected and installed in office. If deemed proper by said board, they may, at any time, in manner as aforesaid, choose or elect a vice-president, who shall possess the power and perform the duties of the president during his absence or disability; and in case of the death, resignation, or other disability of either of the said officers, or of both, or of any director of said company, the board shall fill the vacancy for the remainder of the term, or for the time being, as the case may require.

ARTICLE V.

The president, or other officer appointed by the board of directors, for the purposes aforesaid, shall be authorized in the name and behalf of the company, and in and by policy of insurance in writing, to be signed by the president or other officer and secretary of the company, to
35 make contracts of insurance with any person or persons, or body politic or corporate, against loss or damage by fire, upon any property on which this company may lawfully make insurance, for such term or terms of time, and for such premium or consideration, and under such modification or restriction, as may be agreed upon by the parties.

ARTICLE VI.

On the 2d Tuesday of January, 1857, and annually every year thereafter, there shall be an election for directors of the company, consisting of not less than thirteen nor more than thirty. Every stockholder of the company shall be entitled to one vote for every share of stock, upon presentation of a certificate or certificates for the same. Persons may vote by proxy if the proxy be and is accompanied by the before-mentioned evidence of the right so to vote. In case of a failure to elect, from the number of votes being equal, a new election is to be held to fill the undetermined places. Such directors shall hold their respective offices for one year, or until others are elected in their stead. And the officers, secretary, clerk, and agent shall be appointed by, and hold his and their offices during the pleasure of, the board of directors.

36 ARTICLE VII.

The board of directors shall have power by by-laws to declare from time to time what number of directors less than a majority shall constitute a quorum for the transaction of business; but such a quorum shall not be less than seven of the said directors. And also to make such other by-laws as may be deemed necessary for the government of the officers and the conduct of their affairs. And also to appoint a secretary and as many clerks and other officers as they may deem necessary to carry on the business of the company; and they may grant and pay such salaries and allowances as shall seem meet, and change the same at pleasure.

ARTICLE VIII.

It shall be lawful for this company to invest its capital, or the funds accumulated in the course of its business, or any part thereof, in the manner and as is prescribed and made lawful by the 8th and 9th sections of the act entitled "An act to provide for the incorporation of fire-insurance companies," passed June 25, 1853.

37 ARTICLE IX.

It shall be the duty of the president and secretary of this company, annually, on the first day of January, or within one month thereafter, to prepare, under their own oath, and deposit in the office of the comptroller of this State, a statement of the condition of this company on the 31st day of December then next preceding, exhibiting the facts and items, and in the form required by the 22d section of said act.

ARTICLE X.

Suits at law or in equity may be prosecuted and maintained by any member against this corporation; but no member of this corporation, not being in his individual capacity a party to said suit, shall be incompetent as a witness.

ARTICLE XI.

A majority of the whole board of directors may, in their discretion, accept and exercise any additional power and privileges which may be at any time conferred upon this company, either by amendments of the act under which it is organized or by any act hereafter to be passed.

38 ARTICLE XII.

John H. Macy, A. S. de Peyster, John McKesson, James S. Petrie, and Reuben W. Howes shall be the commissioners to open books for the subscription to the capital stock of this company, at such time and places as they shall deem proper, and may keep such books open until the said sum of $150,000 (one hundred and fifty thousand dollars) shall be subscribed in full.

ARTICLE XIII.

The charter of this company shall be of and for thirty years' duration; but nothing herein contained shall be construed to prevent a subsequent extension of the same.

New York, Sept. 17, 1855.

39 By-laws of the Relief Fire-Insurance Company, New York. New York: H. Anstice & Co., stationers, No. 23 Nassau street. 1872.

40 *President*—James H. Pinkney.
Vice President—I. Green Pearson.
Secretary—William E. Crary.
Directors—Reuben W. Howes, I. G. Pearson, John McKesson, Francis Brown, James L. Todd, J. H. Pinkney, H. W. Belcher, J. T. B. Maxwell, Gideon Pott, William C. Barrett, Henry Demarest, Winfield S. Hanford, Joseph Rogers, Henry Anstice, Junius A. Fuller, William A. Pond, James N. Paulding, F. H. Macy.

41 The charter of this company was amended May 25th, 1859, and a copy of the same filed in the office of the county clerk in this city June 2, 1859, increasing the capital stock of the company $50,000, making the entire capital $200,000.

42 By-laws of the Relief Fire-Insurance Co.

ARTICLE I.

Officers.

SECTION 1. The officers of this company shall consist of a president and secretary, and the board of directors may elect a vice-president.

SEC. 2. The president shall be elected annually, from among the directors, by ballot, immediately after each annual election. The vice-president (if one should be determined upon) shall be elected in like manner as the president.

SEC. 3. The secretary, a surveyor, and counsellor at law shall be appointed by the board of directors, to hold their offices during the pleasure of the board.

43 SEC. 4. No officer shall be removed without such removal is voted for by a majority of the board of directors.

ARTICLE II.

Duties of president.

It shall be the duty of the president to preside at all meetings of the board, and to perform such other duties as may properly belong and appertain to the executive department. He shall take charge of the common seal, the certified copy of the charter, the bonds and mortgages, and other property belonging to the company. He shall subscribe all policies, and shall execute and affix the seal of the company to instruments which may be necessary, provided the finance committee shall by resolution authorize him to do so.

All checks on banks, certificates, and transfers of stocks, and all receipts given in payment of bonds to the company shall be signed severally by the president and secretary.

He shall call regular quarterly meetings of the board on the Wednesday succeeding the first Monday in the months of January, April, July, and October, and at such other times as in his judgment may be necessary, and also on the written requisition of five directors.

44 ARTICLE III.

Duties of vice-president.

The vice-president (if one should be appointed, or a president pro tem.) shall act in the place of and discharge all the duties of the president, in the event of his sickness, necessary absence, or vacancy of the office.

ARTICLE IV.

Duties of secretary.

It shall be the duty of the secretary to countersign all policies of insurance, checks on banks, certificates and transfers of stock, and all instruments to which the seal of the company is required by the finance committee.

To keep correct accounts of all transactions of the company.

To receive and deposit the cash funds of the company in such bank or banks as the board of directors may designate. To cause a monthly balance-sheet of the affairs of the company to be prepared and laid before the president and board of directors at each of their regular meetings. To superintend and direct the services of the surveyor and clerks of the office, and generally to do and perform all the du-
45 ties appertaining to the office of secretary, subject, however, to the control of the president or vice-president, as the case may be.

ARTICLE V.

Standing committee.

SEC. 1. Immediately after the adoption of the by-laws, and annually thereafter, at the regular meeting of the board succeeding the annual election, the board shall elect, by ballot or as they may determine, the following standing committees, viz: A finance committee, to consist of three directors; a committee on claims, to consist of three directors; an executive committee, to consist of three directors. Each of these committees shall keep a book of minutes of their proceedings, to be attested by the respective chairmen of said committees and kept by the officers of the company for the convenience of the directors The president shall be ex officio member of the several standing committees.

Finance committee.

SEC. 2. It shall be the duty of the finance committee to examine into all receipts and disbursements of the funds of the company; to
46 loan the same agreeable to the provisions of the law; to call in and reloan the same, as the interests of the company may require, and shall have power to substitute new securities for loans, and to direct the sale of any stocks belonging to the company whenever the interest of the company shall require it. This committee shall also report to the board the amount of the salaries of the officers, surveyor, and clerks of the company, subject to the approval of the board; and it shall also be their duty to examine and report to the board quarterly the actual condition of the company, its assets, liabilities, and investments, and compare the same with the books of the company.

Committee on claims.

SEC. 3. It shall be the duty of the committee on claims to ascertain as far as practicable the origin, nature, and extent of claims or losses arising against the company.

They shall have power to compromise and settle claims arising from loss or damage by fire, and report the same to the board when required by any director; but the president and secretary may, and they are hereby authorized to, settle and compromise losses and claims not exceeding in amount one thousand dollars. [Note.—See proceedings of committee on claims, Feb. 14, 1866.]

47 *Executive committee.*

SEC. 4. It shall be the duty of the executive committee to act in connection with the officers of the company, and determine upon special risks, such as manufactories and similar risks; to decide on the amount to be insured and the premium to be required.

To examine the monthly statement of the secretary, and compare the same with the books of the company; and, in case of the temporary absence of the secretary or surveyor, to appoint a suitable person to discharge their respective duties, and may do all and every indispensable act or thing, to all intents and purposes, as fully as the board of directors could do, and exercise all the powers possessed by them, and report their action to each regular meeting of the board.

ARTICLE VI.

Duties of counsellor.

It shall be the duty of the counsellor to aid the officers of the company by such legal advice as they may solicit; to examine all titles of property referred to him, and to report thereon, in writing, his opinion of its validity, and what, if any, lien and encumbrances affect the
48 same, with a deduction or title; which report and deduction of title shall be filed in the office of the company, with his signature subscribed thereto, and the proper date specified therein, and to attend to all other legal business which the board of directors or committees or officers of the company may require.

ARTICLE VII.

Duties of surveyor.

It shall be the duty of the surveyor to devote his whole time to the service and interest of the company; to survey and carefully inspect all property that may be offered for insurance. He shall make a written report of the same, with a diagram of the premises, building, and adjoining property, in a book kept for that purpose; and also, when practicable, to attend fires, for the purpose of preserving property insured by this company; and in every case of loss or damage he shall repair without delay to the place of the fire, ascertain as far as possible the cause of the fire and extent of the damage, and report the amount and particulars relating thereto, in a book provided for that purpose, and perform such other duties of surveyor as the president shall require.

49 ARTICLE VIII.

The board of directors shall, at any regular meetings, appoint from among the stockholders three gentlemen to act as inspectors at the ensuing annual election for directors, and shall also determine the number of directors to be chosen, the same not to be less than thirteen nor more than thirty, in accordance with the charter.

ARTICLE IX.

Annual election.

The first election for directors shall be held on the second Tuesday in January, 1857, and annually every year thereafter on the Tuesday succeeding the regular meeting of the board in January. In accordance with the charter the attendance of seven directors will be necessary to constitute a quorum for the transaction of business.

ARTICLE X.

Transfer of stock.

No transfer of the stock shall be valid unless made upon the books of the company by the person or persons owning such stock, or
50 by his, her, or their attorney, legally constituted or appointed, or, in case of death, by their personal representive, and upon the surrender of the outstanding certificate of stock to be transferred, and the same cancelled.

ARTICLE XI.

Committee of dividends.

A semi-annual examination of the affairs of the company shall be made by a special committee, to be appointed by the board for such purpose, independent of the finance committee, previous to the declaration of any dividends.

ARTICLE XII.

Dividends.

The board of directors may twice in each year, viz, at their regular meetings in July and January, declare and pay such dividend as they may deem expedient, out of the nett profits of the business of the company, to the stockholders or their authorized attorneys, notice of which shall be published in two or more of the daily papers in this city.

51 ARTICLE XIII.

Alteration of by-laws.

All vacancies occasioned by resignation or otherwise shall be filled at a regular meeting of the board, and by ballot.

No alteration shall be made in these by-laws except by the unanimous consent of the members present, or proposed at a previous meeting of the board, and then adopted by a majority of the whole board.

52 RULES OF ORDER.

1st. Immediately on the assembling of a quorum of members of the board, and the chair being taken by the proper officer, the following shall be the order of business, viz:

1. Calling of the roll.
2. Reading of the minutes.
3. Reports of officers of the company.
4. Reports of standing committees.
5. Unfinished business.
6. New business.

2. The presiding officer shall decide all questions of order, subject to an appeal by the board.

3. No motion shall be debated or put unless seconded and reduced to writing at the request of any director.

4th. When any question is under debate, no motion shall be received, except to amend, to postpone, for the previous question, or to
53 adjourn, which latter motion excludes all debate, and shall always be in order.

5th. All questions to be put in the order must, except in filling blanks, when the largest sum and the longest time named shall be first put.

6th. No motion for reconsideration shall be in order unless moved at the same meeting by a director who voted in the majority.

7th. The yeas and nays shall be ordered by the presiding officer, on the call of any director duly seconded.

8th. Any director may call for a division of the question when the sense of the same will admit.

54 EXHIBIT B.

(Copy.)

Know all men by these presents that the Relief Fire-Insurance Company of the city of New York, in the State of New York, desiring to transact business in the commonwealth of Massachusetts, in conformity with the laws thereof, hereby constitutes and appoints Edwin B. Dow, esq., of city of Boston, in the county of Suffolk, and commonwealth aforesaid, (who is a citizen of said commonwealth and resident therein,) to be its general agent and the true and lawful attorney of said company in and for the commonwealth of Massachusetts, upon whom all lawful processes in any action or proceeding against said company in said commonwealth may be served in like manner and with the same effect as if said company existed therein. And the said company hereby stipulates and agrees that any lawful process against said company, which is served on its said general agent and attorney, shall be of the same legal force and validity as if said company had existed and been duly served with such process in said commonwealth.

This appointment and the authority of said general agent and attorney shall continue in force, and shall not be revoked, so long as any liability remains outstanding against said company in said commonwealth, and until another general agent and attorney is duly substituted and appointed.

In witness whereof the aforesaid company, pursuant to a resolution of its board of directors, duly passed on the fifth day of January, A D. 1869, (a certified copy whereof is hereto annexed,) hath caused these presents to be subscribed by its president, and countersigned by its sec-

retary, and the corporate seal of said company to be hereunto affixed, this first day of January, in the year one thousand eight hundred and seventy.

(Signed) J. H. PINKNEY, *President.*
(Signed) W. E. CRARY, *Secretary.*
[SEAL OF CO.]

[50-ct. rev. stp.]

55 (Copy.)

STATE OF NEW YORK,
County of New York, ss:

On this twenty-fifth day of January, A. D. 1870, before me, the subscriber, a commissioner for the Commonwealth of Massachusetts, duly appointed and qualified, personally appeared the before-named J. H. Pinkney, president, and W. E. Crary, secretary, of the Relief Fire-Insurance Company, (who are *are* personally know to me,) and severally acknowledged the execution of the foregoing instrument by them subscribed, and they severally made oath that they are respectively the aforedescribed officers of said insurance-company; that the seal affixed to said instrument is its true and proper corporate seal; and that they subscribed said instrument, and said corporate seal was affixed, by virtue of authority duly conferred by said corporation.

Witness my hand and official seal, at New York City, in the State and county aforesaid, the day and year above written.

[L. S.] CHARLES NETTLETON,
Commissioner for Massachusetts in New York.

56 (Copy.)

At a meeting of the board of directors of the Relief Fire-Insurance Company, duly held on the fifth day of January, A. D. 1869, a quorum being present, the following resolution was adopted:

"Resolved, That this company hereby appoints Edwin B. Dow, esq., of Boston, in the county of Suffolk and Commonwealth of Massachusetts, to be its general agent and true and lawful attorney in and for said Commonwealth, upon whom all lawful processes in any action or proceeding against this company in said Commonwealth may be served in like manner and with the same effect as if this company existed therein. And this company hereby stipulates and agrees that any lawful process against it, which is served on its said general agent and attorney, shall be of the same legal force and validity as if served on this company. This appointment and the authority of said agent and attorney shall continue in force, and shall not be revoked, so long as any liability remains outstanding against this company in said Commonwealth, and until another general agent and attorney is duly constituted and appointed; and the president and secretary are hereby authorized to execute, in the name of the company and under its corporate seal, a certificate of authority or power of attorney to the said , in conformity with this resolution and the laws of said Commonwealth."

I hereby certify that the above is a true copy of the resolution of the directors of this company authorizing the appointment of a general agent and attorney for the Commonwealth of Massachusetts, as recorded by me.

W. E. CRARY, *Secretary.*

57 BOSTON, *Jany. 27th*, 1873.

I hereby certify that the certificates hereto annexed are true and faithful copies of originals now on file in the office of the insurance-commissioner of Massachusetts.

[L. S.] STEPHEN H. RHODES,
Dept. Ins. Comr.

(Indorsed:) Fire-companies. Insurance-department of Massachusetts. Insurance-company of . Appointment of general agent and attorney for the State of Massachusetts. Filed , 18 . [1873.]

58 EXHIBIT C.

(Copy.)

Know all men by these presents that the Relief Fire-Insurance Company of the City of New York, in the State of New York, desiring to transact business in the Commonwealth of Massachusetts, in conformity with the laws thereof, hereby constitutes and appoints Wm. H. Whitcomb, esq., of Boston, in the county of Suffolk and Commonwealth aforesaid, (who is a citizen of said Commonwealth and resident therein,) to be its general agent and the true and lawful attorney of said company in and for the Commonwealth of Massachusetts, upon whom all lawful processes in any action or proceeding against said company in said Commonwealth may be served in like manner and with the same effect as if said company existed therein. And the said company hereby stipulates and agrees that any lawful process against said company, which is served on its said general agent and attorney, shall be of the same legal force and validity as if served on said company.

This appointment and the authority of said general agent and attorney shall continue in force, and shall not be revoked, so long as any liability remains outstanding against said company in said Commonwealth, or until another general agent and attorney is duly substituted and appointed, said Wm. H. Whitcomb being substituted in place of Edwin B. Dow, the present agent of the company.

In witness whereof the aforesaid company, pursuant to a resolution of its board of directors, duly passed on the ninth day of October, A. D. 1872, (a certified copy whereof is hereto annexed,) hath caused these presents to be subscribed by its president, and countersigned by its secretary, and the corporate seal of said company to be hereunto affixed, this twenty-first day of October, in the year one thousand eight hundred and seventy-two.

(Signed) J. H. PINKNEY, *President.*
(Signed) W. E. CRARY, *Secretary.*

[COMPANY SEAL.]

59 STATE OF NEW YORK,
County of New York, ss:

On this twenty-first day of October, A. D. 1872, before me, the subscriber, a commissioner for the Commonwealth of Massachusetts, duly appointed and qualified, personally appeared the before-named James H. Pinkney, president, and W. E. Crary, secretary of the Relief Fire-Insurance Company, (who are *are* personally known to me,) and severally acknowledged the execution of the foregoing instrument by them subscribed, and they severally made oath that they are respectively the aforedescribed officers of said insurance-company; that the seal affixed

to said instrument is its true and proper corporate seal; and that they subscribed said instrument and said corporate seal was affixed by virtue of authority duly conferred by said corporation.

Witness my hand and official seal at New York, in the State and county aforesaid, the day and year above written.

[SEAL OF R. B. V.] (Signed) ROBERT B. VALENTINE,
Commissioner for Massachusetts.

60 (Copy.)

At a meeting of the board of directors of the Relief Fire-Insurance Company, duly held on the ninth day of October, A. D. 1872, a quorum being present, the following resolution was adopted:

"Resolved, that this company hereby appoints Wm. H. Whitcomb, esq., of Boston, in the county of Suffolk and Commonwealth of Massachusetts, to be its general agent and true and lawful attorney in and for said Commonwealth, upon whom all lawful processes in any action or proceeding against this company in said Commonwealth may be served in like manner and with the same effect as if this company existed therein. And this company hereby stipulates and agrees that any lawful process against it, which is served on its said general agent and attorney, shall be of the same legal force and validity as if served on this company. This appointment and the authority of said agent and attorney shall continue in force, and shall not be revoked, so long as any liability remains outstanding against this company in said Commonwealth, or until another general agent and attorney is duly constituted and appointed; and the president and secretary are hereby authorized to execute, in the name of the company and under its corporate seal, a certificate of authority or power of attorney to the said Wm. H. Whitcomb in conformity with this resolution and the laws of said Commonwealth, said Wm. H. Whitcomb being substituted in place of Edwin B. Dow, the present agent of the company."

I hereby certify that the above is a true copy of the resolution of the directors of this company, authorizing the appointment of a general agent and attorney for the Commonwealth of Massachusetts, as recorded by me.

(Signed) W. E. CRARY, *Secretary.*

COMMONWEALTH OF MASSACHUSETTS,
OFFICE OF INSURANCE-COMMISSIONER,
Boston, Nov. 19, 1873.

I hereby certify that the foregoing is a true copy of the original now on file in this office.

[L. S.] STEPHEN H. RHODES,
Deputy Insurance-Commissioner.

61 (Indorsed:) Insurance department of Massachusetts. Relief Fire-Insurance Company of New York. Appointment of general agent and attorney for the State of Massachusetts. Filed , 18 . [1870.]

62 EXHIBIT D.

Testimony of Elijah J. Shaw.

Q. (By Mr. Barrett.) You are plaintiff in this case?
A. I am.
Q. Where do you reside, and where do you do business?
A. My family live in Lexington, Massachusetts. I do business in Jefferson, Texas.

Q. Will you be kind enough to state where you were on the 15th day of Oct., 1872?

A. I was in Boston.

Q. What were you doing?

A. On the 15th of Oct., 1872, I went into the office or insurance agency of Edwin B. Dow, 15 Water st., to get insurance on the goods that I had stored at H. A. Ball's, Pearl st., to await shipment to Jefferson, Texas. I told Mr. Colby, Mr. Dow's clerk, to whom Mr. Dow always refer'ed me to in insurance matters, and who generally did all the writing, such as taking applications and such business, that on account of low water in Red River I was storing my goods at H. A. Ball's,
63 75 Pearl st., to await shipment, and that I wanted insurance on those goods to the amount of $5,000. I wanted insurance on the goods I then had there, or might put in there to await shipment, to the amount of $5,000. He asked me if I had that amount there then, and I told him I didn't know just what amount I had, as I had not got all the bills and had not reckoned up what I had in the store, but I expected to have a good deal more than that. He asked me if I could tell just how many goods I had there in case of loss by fire. I told him I could tell exactly by my bills and otherwise; I could tell exactly the number of cases I had. He remarked that no matter how much insurance I had, that I would only get pay for the goods that were burned or damaged. He asked what company I would have the insurance in, and I told him that I thought I would have it on my open policy.

Q. What did you mean by that?

A. An open policy that I had been insuring cotton on previously and kept there in their office. I kept the policy there, and from time
64 to time, as I sold the cotton, I went in and cancelled the insurance. The day before I went in and paid an account of $19.28, which was due.

Q. Due on what?

A. On the open policy; previous insurance.

Q. You went in and paid $19 and odd, that was due as a premium on the open policy you had at Mr. Dow's office?

A. Yes, sir.

Q. In what co. was that?

A. I think it was the Phœnix, of Brooklyn.

Q. Brooklyn, New York.

A. Yes, sir. I told him I thought I would have it on that open policy; that was my intention. He said he thought he would rather put it into some other co. for which they were agents, and named the Relief, of New York. I had never heard of that co., and I asked him if it was an a No. 1 co. He said it was a good company; had a capital of, I think, $200,000 and a good surplus, and he thought a company doing a small business in Boston was safer than a large company. I told
65 him I presumed it was all right and I would have it in that company. I asked him what the rate would be for insurance on Pearl street, and he said he thought it would be the same as I had taken out on cotton, at the rate of $\frac{66}{100}$ per cent. per annum. I told him I understood they were getting insurance as low as $\frac{50}{100}$ or $\frac{1}{2}$ per cent. on Pearl street, but he said he thought not, but they would do it at the regular rates. He said insurance companies had a regular rate, and he would do it at the regular rate, and he took a memorandum of the insurance.

Q. Were there any other parts of the contract spoken of; what was said about the time?

A. He asked for how long a time I wanted that insurance, and I told

him, as I did when I first went in there, that I wanted the goods insured until I could ship them, which I thought would be soon, as Red River is usually navigable early in November. He said he thought I had better put it for some specified time, say for one month. I told him it made no difference; I wanted the goods insured until they were shipped, and I would give my shippers notice when the goods were shipped
66 to go there and notify and cancel the policy. He took a memorandum and asked me the number of Mr. Ball's store. I told him I thought it was 75 Pearl street. To make certain, he took down his directory and found it was 75 Pearl street. In writing my name he called the initials wrong. I cannot say exactly what, but he made a mistake in the initials, and Mr. Robinson, who went in with me when I went to get the insurance, called his attention or my attention to it, and it was corrected. He made an error in calling the initials or writing them—I don't know whether he had written them or called them; at any rate, he made a mistake, I think—and Mr. Robinson corrected it. In writing the amount I remember he asked me if $5,000 would be enough, and I told him that I wanted $5,000 certain, and if I wanted any more, if I found I was storing more goods than I then expected and wanted any more insurance, I would come in and let him know. He said to be sure and come in before I went away. I found I didn't need any more insurance; that I had only about $6,000 or 7,000
67 in the store, and didn't go in. After he seemed to be all through making the memorandum I asked him if there was anything more. I was waiting there, and he said that was all; there was nothing more. I then asked him if the insurance took effect from that time, and he said it did. I asked particularly in regard to that, as I always did, and more particularly because some parties in Pearl street were waiting.

Q. (Interrupting.) You asked particularly that question and got your answer?

A. And got that answer.

Q. For certain reasons in your mind?

A. Yes, sir. We had some little talk in regard to the insurance, and also in regard to another company, and as we came out, or as I came out, he had some statements of another company lying there, and I took up one or two of them and asked him if they were agents for that company, and he said they were. He asked me to take one or two and examine them, and I did so. I had been in the habit of getting insurance at Mr. Dow's, and looked upon them——

Q. What had been your method of dealing with Mr. Dow in getting insurance at his agency?

Mr. ABBOTT. I object.

68 Q. You say you had been in the habit of dealing with Mr. Dow in the matter of insurance for some time, and getting your insurance there. Was Mr. Dow in the office at this time?

A. He was not in the office at the time I was getting the insurance.

Q. Did he come in while you were there?

A. He was in when I first went in, but went out. I told Mr. Colby further in regard to the insurance, that I should leave the insurance with my shipping agent; that I should not take the policy, but leave it as I had my open policy, and notify him to come in—when I telegraphed to him to ship goods—to come in and cancel the policy; and I gave the directions of my shipper.

Q. What was said, if anything, about the payment of the premium?

A. There was nothing said about the payment of the premium.

Mr. BARRETT. We submit to the court that we would like to ask the witness what his habit had been in dealing with Mr. Dow, in the matter of insurance, in respect to the payment of the premium
69 that he might owe there.

Mr. ABBOTT. We object to that because he never dealt with Mr. Dow, as it appears here, as agent of this company, previous to this point of time; how his dealing with Mr. Dow as agent of their companies can affect our rights, I don't see.

The COURT. I don't quite see how it can affect your clients in the matter of contract, still it might tend to show whether or not a bargain was made—that he had been in the habit of doing certain things. It might throw some light on the question whether the bargain was completed in the course of business he had been in the habit of conducting with Mr. Dow, as agent for their people.

Mr. ABBOTT. Suppose it should turn out this gentleman had no authority in any way whatever?

The COURT. I am not dealing with what may turn out.

Mr. ABBOTT. Take it as it is now, there is nothing shown in that direction; they have not shown that he has authority to deal upon credit; that is sufficient for my purpose.

70 The COURT. I don't think it is; all we know now is, he was an agent.

Mr. ABBOTT. If they desire to show he was a general agent, they have not yet shown any general agency. This only shows this: he was an agent to receive service of process, and nothing else. Now, I claim, if they want to show that he was a general agent to make any contract of insurance on the face of the earth, they must prove it by something different from what has been put in. Until they do, there is no evidence that he had authority to take this insurance on credit.

The COURT. The authority would be a distinct matter, I agree, but it would not regulate this point necessarily, because we have to take one witness at a time. It might be admissable now, on the supposition that they can show him to be an agent hereafter, and I suppose they undertake to show that; they said they should, and supposing he wa' a general agent, it does seem to me it might have some learning on the
71 question, whether the contract was to be considered complete or to exclude a conclusion that it was not complete because no premium was paid, to show that he had not been in the habit of troubling himself about that in his dealings with man as agent of other people; not on the question whether your client would be bound by a credit of contract; not *not* the slightest; leaving that out, supposing that is to be proved hereafter, it does seem to me that the course of dealing between these parties, in which Mr. Dow was representing other companies, might tend to show whether the fact of the premium not being paid, was one which showed an incomplete contract in itself. To that exten', and supposing the authority to be proved hereafter, I think it is admissable.

Mr. ABBOTT. Your honor will save the exception.

Q. What had been your habit in dealing with Mr. Dow, theretofore, in matters of insurance?

A. It had been my habit to go in there and get my insurance entered, and then when the cotton—(I insured mostly cotton at that time; I was shipping in Boston, selling for parties in Texas)—I would
72 go in afterwards when it was sold and order it cancelled. On the 14th of Oct., I have in my memorandum-book ——

Q. No matter about your memorandum-book.

A. An entry of $19.38 that I paid on this open policy. Some of it had been running for a considerable time. I also on that date got, through Mr. Dow, $8,000 insurance on my stock in Jefferson in the Manufacturers' Company, in Boston, and paid for it some time after I got the policy.

Q. Was anything said to you about paying the premium at that time?

A. There was nothing said. The address of Mr. Ball, 75 Pearl street, was taken by Mr. Colby, as I understood him to say, as being where the goods were stored.

Q. As I understand you, then, habitually you did not pay your premiums at the time you contracted for your insurance?

A. I never have.

Q. But only from time to time, as it might be convenient to you?

A. Yes, sir; I went in once before to pay the bill that I paid on the 14th, but they were not ready to make up the account.

73 Q. You had an account then at Mr. Dow's, had you?

A. Nothing more than insurance on the open policy that I had not paid the premium on.

Q. I understood you to say that you had known Mr. Dow and had been in the habit of getting insurance at his agency for how long?

A. For more than a year—a year and a half.

Q. And that Mr. Colby had been his clerk during all that period?

A. Yes, sir.

Q. Was any policy of insurance in writing offered or tendered to you after you made the negotiation to which you here testified?

A. No, sir.

Q. No premium demanded of you?

A. No, sir.

Q. When did you leave for Texas?

A. That year, sir.

Q. Before or after the fire?

A. Before the fire; the 22nd of October.

Cross-examination:

74 Q. (By Mr. Nutter.) Mr. Shaw, did anybody go with you on this occasion?

A. Mr. Robinson.

Q. Was he there through the whole interview?

A. I don't think he was.

Q. Did he go into the office with you?

A. Yes, sir.

Q. Did he go out with you?

A. I think he was on the stairway when I came out; I think he went out a minute or two before I came out.

Q. Then he stayed there during all the conversation?

A. I don't know that he did all of it; most of it.

Q. He stayed until after you say there was a memorandum made by Mr. Colby in which there was a mistake?

A. Yes, sir.

Q. He called your attention to that mistake you spoke of?

A. Yes, sir.

Q. He called your attention to the mistake?

A. Yes, sir.

Q. What memorandum was that, sir?

A. In regard to the place where the goods were in.

75 Q. I understood you, sir, there was a mistake in your name.

Mr. Colby made a mistake in putting down your name, I understood you to say?

A. Mr. Colby in writing or calling my name called it wrong, and Mr. Robinson called my attention to it, and Mr. Colby said he had been writing another name something like that, and made a mistake in that way.

Q. Did Mr. Colby give you any piece of paper on which there was writing?

A. Mr. Colby gave me nothing that I know of; he may have given me a memorandum of the number of his office; he gave me a statement of an insurance co.; one or two.

Q. Did he give you any memorandum in writing this insurance?

A. He gave me no memorandum of this insurance unless possibly he may have given me the number of his own office for me to give to Mr. Ball.

Q. You are not certain whether he gave you the number of the office?

A. I am not certain.

Q. Did he give you anything more, any policy, or anything of that sort? Did he give you anything besides the number of his office,
76 supposing he gave you that?

A. I don't think he did.

Q. If a mistake was made in your name, sir, then where was it made?

A. In the office.

Q. Well, upon any talk?

A. I don't know whether he had written it or whether he called it wrong.

Q. Well, sir, where did you first discover there was a mistake in the name?

A. Mr. Robinson called my attention to it.

Q. When was that?

A. At the very moment he was making it.

Q. When he was making what—the memorandum of insurance?

A. When he writing the memorandum I was giving in the name of the [society,] and at that time he called my initials wrong.

Q. After what, sir; where did Robinson call your attention to the mistake?

A. At that time.

Q. Do you know whether it was after it was written or before?

A. I could not say whether it was written or not. I think it
77 was in his calling over my name, but I could not say certain.

Q. Was it after the directory was taken down to be looked at?

A. I could not say in regard to that; I think it was.

Q. Was it not the last thing that took place before you went out that Robinson called your attention to the name, and you asked to have it altered?

A. I don't think it was; I think it was at the time when the memorandum was made.

Q. Then there was no returning from going to the door or out of the door to have the name altered?

A. I don't remember any.

Q. Are you sure there was not any?

A. I am not sure, though I do not remember.

Q. You say a time was mentioned for which this risk was to run?

A. Yes, sir.

Q. How was that; who spoke of it first?

A. I said I wanted the goods insured, that I could ship them. Mr. Colby said it was necessary to put more stated time. I thought a month would cover the time.

Q. Never mind what you thought; what did you say?

78 A. I let it go so.

Q. Did you or did he say a month?

A. He said a month.

Q. And you agreed to it?

A. Well, yes.

Q. But did you say you wanted a year, and did he say you had better put it a month?

A. He said it had better be a month.

Q. Which of you first said a month?

A. Mr. Colby.

Q. And you agreed to it?

A. Yes, sir.

Q. And it was settled for a month?

A. Yes, for a month, and longer if the goods were not shipped.

Q. No doubt about that; no doubt a month was settled upon as the time. It never was a year, was it?

A. No, sir.

Q. You did not agree upon a year?

A. No, sir; we did not agree upon a year.

Q. Do you know that nothing was ever said about a year?

A. No.

Q. Now, sir, who mentioned the rate?

79 A. I asked Mr. Colby what the rate would be. He said he supposed the rate would be the same as it was on the cotton warehouses, $\frac{60}{100}$ per cent. per annum.

Q. That was per annum, you say?

A. Yes, sir.

Q. Then the rate you fixed was the rate per annum; that is so, is it not, sir?

A. I supposed it would be less for a month.

Q. The rate was a rate per annum?

A. That was all that was said about it.

Q. Is that your signature? (Handing witness a paper.)

A. Yes, sir.

Q. Now, you never had all this time any idea different to a monthly insurance, have you?

A. My idea has been all the time that in case these goods had not been shipped within a month, they would renew this policy.

Q. Then, that was a contract for a month, and to be extended, was it?

A. The contract was what I stated.

Mr. NUTTER. I want it stated now.

Mr. HODGES. I am not sure that this is the proper course of examination. The witness states what was done, and does so again and again; and then when he is called upon to put a legal construction upon

80 what he has done, we submit we are here to ask your honor to do that exactly, and that it is not proper to call up the witness do anything of that kind.

Q. (By Mr. Nutter.) I do not ask for any legal construction; I ask you if you had any talk with Mr. Colby about this question of per month?

A. I told him I wanted the goods insured till I could ship them.
Q. He said it would be a month or more, and you agreed to it?
A. Yes, sir.
Q. Was there any talk; did you agree, or did he agree that it was to go beyond a month?
A. It was my understanding.
Q. Never mind your understanding. What was said then?
A. I told him I wanted the goods insured till they were shipped.
Q. Well, sir, was that the contract, that they were to be insured till shipped?
A. He said——
Q. Never mind what he said. Was there anything said between you and him beyond a monthly insurance?
81 A. Only what I have stated.
Q. Very well; you had got a policy which you issued through Mr. Dow, of the Manufacturers' Co.?
A. He went to the Manufacturers' Co.
Q. You got the policy before you left Boston, didn't you?
A. I don't think I did. I took no policy with me. I never had it.
Q. Who paid the premium on that, sir?
A. I paid the premium.
Q. When did you pay it?
A. I paid it about the 20th of October.
Q. 1872?
A. Yes, sir.
Q. When did you get the insurance?
A. On the 14th.
Q. And took your policy on the 20th?
A. I think I took it then, but there are two leaves of my memorandum book gone. I must have taken it out on the 18th or 19th.
Q. And paid for it then?
A. Yes, sir.
Q. I understood you were in Dow's office this talk with Colby on the 15th?
A. No, sir.
Q. When did you leave Boston?
82 A. On the 22nd.
Q. October?
A. Yes, sir.
Q. Did you say anything to Mr. Colby about going in again, about this talk of the 15th?
A. I told Mr. Colby that if I found I wanted another insurance for more than $5,000, I would come in again, and he said it was good.
Q. Was anything said to Mr. Colby about going in before you went away to get this policy?
A. No, sir; that was to be left to the shipping clerk; to Mr. Ball.
Q. Do you know how much goods you had there on the 15th?
A. I do not know.
Q. You did not know at the time you were there?
A. No, sir.
Q. You were sure it would not be $5,000.
A. I did not think it would be.
Q. Not at that time?
A. No, sir.
Q. You had it before, I understood you, upon open policies?
A. Yes, sir; I had an open policy and kept that all the time.

83 Q. That was in another company?
A. Yes, sir.
Q. And you went in with the idea and for the purpose of applying for a local policy on this occasion?
A. No, sir; I went in with the intentions of insuring on that same open policy.
Q. Were there any other policies besides the Manufacturers' and this open policy issued by Dow for you?
A. No, sir.
Q. These are all the dealings you have had with him?
A. Yes, sir; all the insurance I have had in Boston.
Q. Who did you pay the premium of the Manufacturers' to?
A. Paid at the office.
Q. At the Manufacturers' office?
A. Yes, sir.
Mr. BARRETT. I now offer the deposition of Foster F. Robinson, of Jefferson, Marion County, Texas, taken under the commission of this court. (Counsel read the document.)
At this point a consultation between the court and the respective counsel resulted in the striking out a part of this deposition.
Adjourned to Friday, Dec. 5th, at ten o'clock.

84 FRIDAY, *December 5th*, 1873.

One of the jurymen being absent, it was agreed to proceed with eleven.

ELIJAH A. SHAW recalled.

Q. (By Mr. Nutter.) Did you have any other transactions with Dr. Dow's agency except the three you have named; I ask you other "transactions," and I am not putting that as to accomplished insurances, but except the 3 you have named?
A. Not when he was agent there.
Q. Not with him as agent at any rate?
A. No, sir.
Q. One of those was a transaction on an open policy.
A. Well, that included four or five, five or six, running along.
Q. There was an open policy in the ordinary way in writing?
A. Yes, sir.
Q. One open policy.
A. One open policy.
85 Q. That was not from this company; the Relief Company?
A. I think that was in the Phœnix Company of New York. I have not seen the policy for two years; but I think that was it.
Q. Was not that a transaction in which Mr. Dow went with you to another office and obtained it? Was he agent for that office in which he obtained it?
A. I don't think he was; I don't know. I think he held that policy and accounted my agent.
Q. You knew he was not the agent of the Phœnix Co. when he obtained that policy? He did not purport nor pretend to be the agent of that company here?
A. I don't think he was the agent of that company.
Q. He left his office and went out and obtained it from another office?
A. I went there several times.
Q. And he went out and obtained it from another office?

A. I cannot say; I do not know. However, I went in there several times, and he eventually got it.

Q. You did not understand that he was the agent of the company in any way?

86 A. I did not understand it so; but I cannot say, anyway. I am not sure.

Q. Then the next transaction was the Manufacturers' Insurance Co., was it not?

A. Yes, sir.

Q. Well, you did not understand that he was the agent of the Manufacturers' Ins. Co., did you?

A. I did not know, sir.

Q. You did not know?

A. No, sir.

Q. He went out and obtained that as broker?

A. No, sir; he went with me to the company, and introduced me to Mr. Goodrich.

Q. Then he had nothing to do with that except that he introduced you to the Manufacturers' Co.

A. That is all, except that at his solicitation I got it insured.

Q. But you transacted your business, not with him, but with the Manufacturers' Ins. Co.?

A. Yes, sir.

Q. And the next transaction was this matter which we are now trying?

A. That was the next day.

87 Q. So that all the habit you had of dealing with Mr. Dow grew out of these three transactions?

A. Yes, sir.

Re-examined:

Q. (By Mr. Hodges.) On this open policy that you are speaking of, how many entries of insurances were made in the course of its existence?

A. I could not say. I could tell by my memorandum; but I think perhaps five or six.

Q. Where were these made?

A. Made by Mr. Colby, in Mr. Dow's office.

Q. Where was the policy kept?

A. Kept there.

Q. Did you ever have it?

A. I never did.

Q. Where did you pay the premium?

A. At Mr. Dow's office.

Q. To Mr. Dow or Mr. Colby?

A. Mr. Colby.

Testimony of Edwin B. Dow.

88 Q. (By Mr. Hodges.) Mr. Dow, what was your business in October, 1872?

A. Insurance agent.

Q. Where was your office?

A. 15 Water street.

Q. Going to your office from Washington street please state how you would go to it; describe its location so that we can understand it.

A. It was about midway, in what is called the Carpet building, in Water st.

Q. On which side of the way as you went from Washington st.?
A. On the right.
Q. Up how many flights?
A. One flight.
Q. Which side did you turn when you went up the stairs, would it be at the right or left?
A. On the left.
Q. Were you or not, in October, 1872, the agent of the Relief Insurance Co.?
A. I was.
Q. The general agent?
Mr. ABBOTT. I object to that; he must describe what his power was.
Mr. HODGES. That may or may not be.
89 Mr. ABBOTT. Well, I object to the question.
Mr. HODGES. Well, I will hear the objection put to it.
Mr. ABBOTT. I object to it as asking a conclusion of law on a great variety of facts.
LOWELL, J. You can ask him to describe his agency rather than give any epithet to it.
Mr. HODGES. We put in a paper here yesterday as part of the proofs which states him to be the general agent of that company under seal, so that I wanted to hear what objection there might be to it; I was in hopes we should have had the advantage of a statement of what the objection would be.
Q. Did you file in the secretary of state's office a power of attorney?
A. There was filed a paper of that kind.
Q. Did you keep the books in which were entered transactions of insurance?
A. Yes, sir.
Q. Kept one book for that purpose or one book for each company for which you were agent?
A. I kept a general book for that purpose.
Q. In which you entered for any company that might be?
A. Yes.
90 Q. Have you brought that book with you?
A. I have.
Q. I wish you would be kind enough to produce it, and turn to any entry of any transaction you have had between Mr. Shaw and this company,
(Witness produced the entry-book refer'ed to.)
Q. In whose handwriting is the entry written—E. A. Shaw, October 15th?
A. That is in Mr. Colby's writing.
Mr. ABBOTT. You know nothing about it except as it is there, and I object to its going on.
Q. (By Mr. Hodges.) That is your book?
A. Yes.
Q. The book in which you kept your entries?
A. Yes.
Q. Mr. Colby was your clerk?
A. He was.
LOWELL, J. You had better examine him now as to the mode of doing business; when all the evidence is in, then perhaps the book itself may be admitted.
Q. (By Mr. Hodges.) Will you open the book at that place again?
91 (Witness re-opened the entry-book.)

Q. Whose handwriting appears on that page?
A. Mr. Colby's.
Q. Anybody's else?
A. No, sir.
Q. Who kept your books at that time?
A. Mr. Colby kept them.
Q. Did you yourself ever have anything to do with them except the supervising of them, or did you depend upon him to keep them?
A. I depended on him.
Q. What was your custom in doing business for that company as to policies? Had you policies of the company signed that you delivered upon effecting insurances?
A. I had.
Q. And when insurance was sought and agreed upon between you and the parties, or Mr. Colby and the parties, did you then deliver the policy, or did you make application to the company, supposing the terms agreed upon between you and these parties, or did you then fill out a policy and deliver it?
A. I filled out a policy and delivered it.
Q. What was your custom concerning entries wherein application was made for insurance, taking any one of those companies?
92 Was the application made and entered on the book, and the policy delivered, or was the application made and entered on the book, and the policy afterwards delivered and entered?
A. After we had taken an insurance we always sent a copy of the policy to the company.
Q. That is, when the policy was made up you sent them a copy of the policy?
A. That was whether the policy was made up or not.
Q. (By Mr. Abbott.) That was when the insurance was effected?
A. Yes; we sent them a copy every day of what we had done.
Q. (By Mr. Hodges.) Did you send the company a copy of the entry I have pointed your attention to?
A. I did not.
Q. Was one sent from your office?
A. I do not know.
Q. Did you send a copy at any time personally to the company, or was it done by Mr. Colby?
A. I generally left it to Mr. Colby.
Q. Can you recall a case in which you sent a copy personally?
93 A. I do not know that I can recollect a particular case. When Mr. Colby was absent I might.
Q. When you said that your custom was to send a copy, you meant your custom was to have Mr. Colby send a copy?
A. Well, somebody from the office.
Q. Then, when I ask you if a copy of that memorandum was sent to the company you say you do not know?
A. I do not know.
Q. Do you know whether a copy was sent of the insurance upon which I put my finger now? (Pointing to an entry on the book.)
A. There was no copy sent that day.
Q. That one? (Pointing to another entry on the book.)
A. I do not know.
Mr. ABBOTT. That I object to, in reference to other companies.
Q. (By Mr. Hodges.) Do you know that there was sent from your office any copy of any policy to the Relief Co.?

A. I do, sir.
Q. Did you send them yourself?
A. I have, sir.
Q. How many?
94 A. I cannot tell. I did it for two or three years, and I sent a great many; we generally sent them, either me or my clerk.
Q. Generally was it you or your clerk?
A. Generally when those policies were on hand I had other business, and I left it to him.
Q. Do you mean to say that you sent the policy represented by the line which I put my finger on, to the Relief Co. yourself?
A. Yes.
Q. Then is it not as certain that the memorandum we have been referring to was sent to the company as that anything was sent to the company?
Mr. ABBOTT. That I object to.
LOWELL, J. That is an inference.
Mr. HODGES. Yes, your honor; you see the position we are in; the part that is embarrassing is, that the witness volunteers to select these from all the rest. He states voluntarily that it was a custom to send the policies always; and when inquiry is made, this one is selected, and he does not know as to this one but he does as to the others.
95 LOWELL, J. Well, he cannot say as to what *what* he does not know; the inference must be left to the jury.
Q. (By Mr. Hodges.) What was the course of business in your office with regard to policies like these I have referred to?
A. Well, the course of business was this, that if a gentleman came and asked my clerk to make an insurance, an entry was made in the book as to the company it was wanted for, and the property, and its location, and the amount.
Q. Well, then, what was done with it?
A. Then the policy was made.
Q. Did you not tell me a few days ago that that memorandum, just as it was there, was sent to the insurance co.?
A. I think I did. Oh, excuse me; I told you it was sent just as it was after the fire.
Q. Yes, sir; that you did. What time after the fire was that sent?
A. I can't tell exactly what time after the fire it was sent. It was some little time after that I sent it.
Q. Just as it is there?
A. Yes, sir.
96 Q. When these entries were made, and the terms agreed upon, what was the course of business in your office, concerning the policies made and sent out that day or next day, or when?
A. At one time or another.
Q. At one time or another; sometimes never, sometimes kept?
A. Very seldom.
Q. How was it as to making the policy; a memorandum like that made, if you please, to-day, when would the policy be made out?
A. Well, in the course of two or three days.
A. According to the business?
A. Yes.
Q. Well, when made out, as of what date was it made?
A. Oh, when the risk was taken.
Q. And that was the custom in regard to this company?
A. Yes, sir.

Q. And if a policy had been made in the case we speak of it would have been dated that day, the 15th of October?

A. Yes, sir.

Q. I wish you could get a little more definitely the time when that memorandum was sent to your knowledge to the company, after the fire, you say?

97 A. I can't remember the day when it was sent to the company. To the best of my recollection, in looking over the list of policies of which we had considerable burnt up, or we thought they were up in the great fire—in looking over the policies we had on our books—when a policy is made it is taken from the book and entered on the general register, and when we looked over that book and we figured up the losses for the Relief Insurance Co., we found this entry was not registered, and that there had been no policy registered, and to the best of my recollection I asked Mr. Colby if that had been sent to the company, so they would have to register in New York, and I think he told——

Mr. ABBOTT. You need not say what he said.

WITNESS. Well, I made out a copy of that and sent it to New York.

Q. (By Mr. Hodges.) But the time that that was done you cannot very well fix?

A. I cannot.

Q. It occurred in gathering up the losses after the fire and in closing up these matters?

98 A. Yes, sir; that was previous to the agency of the company being removed from us.

Q. Now, at the time of the fire your books, it seems, were not destroyed?

A. My books were not destroyed.

Q. And an application was or was not made to you concerning this matter, and did you not at that time state that this was returned to the company before the fire?

Mr. ABBOTT. That I object to.

Mr. HODGES. I ask the witness, your honor, if he did not state to a party applying to him after the fire that this memorandum had been forwarded to the company and that it was a proper contract, and the question is objected to.

Mr. ABBOTT. I object to that, may it please your honor, for the very patent that declarations of an agent made after the transaction takes place are not evidence to bind anybody.

LOWELL, J. I think he may state now the facts from which you will infer that it was binding, but I do not think his statement that it was binding after the fire is evidence.

99 Q. (By Mr. Hodges.) Whether prior to your removal there was any other agent of the Relief Co. in Massachusetts, to your knowledge?

A. No, sir.

Q. Was there any other doing business for the company in Boston at that time?

A. Not to my knowledge.

Q. Who succeeded you as agent?

A. Mr. William H. Whitman, I believe, sir.

Q. Were you instructed by the agents of the company, who were, I think the term is, the adjusters who adjusted the losses for the company after the fire?

A. I recollect that I was informed by a person coming to me and stating he was adjuster.

Q. Who was that person?
A. I forget his name just now.
Q. Was his name Gilbert?
A. Yes, sir.

Cross-examination:

Q. (By Mr. Nutter.) Now, in getting to your office from Wash-
100 ington st., did you cross any street or lane or alley to get to it where it was at that time?
A. No, sir.
Q. Will you explain to us and the jury this open policy, what it was and how it was made?
A. The open policy in the Relief Ins. Co.?
Q. Yes, sir.
A. Shaw came to me in the fall or winter previous to this insurance and said he had some cotton, some considerable shipments of cotton, arriving, and would like them covered under an open policy, and I told him I would be very pleased to get him one, and made application to the Phœnix Co., of New York, who gave me an open policy for a certain amount, I forget what it was. Mr. Shaw came in several times and made entries on that policy and for such time as he thought he would want the cotton covered.
Q. That is to say, a policy is issued for a certain gross amount in the original in the first place, and in that the risks attach as they are written upon it?
101 A. Yes, sir; upon an open policy.
Q. And when such attaches the rate of premium is fixed to that particular risk?
A. Yes, sir.
Q. Then when is the premium which attaches to the whole of that policy adjusted and ascertained?
A. At the termination of the risks.
Q. Then until that policy has run up in full, or until the insured do not wish it any more, the amount of the premium is not settled—the gross amount?
A. No, sir.
Q. And it then becomes payable?
A. Yes, sir.
Q. Now this one of the Phœnix was open a year before?
A. I believe it was.
Q. Do you recollect how late any entries were made upon it, sir?
A. I do not, sir; some were made about January, I think.
Q. January, 1872, was about the last entry on that policy?
A. I believe it was, but I won't be certain. I cannot give positive evidence about that. I don't know.
102 Q. The premium upon it, it seems, was paid on the 25th October?
A. The premium was paid at a long time after the insurance was effected; I know that.
Q. Any efforts been made to collect it, sir?
A. We understood that Mr. Shaw had gone to Galveston, and we did not know who represented him in Boston.
Q. Now he came in on the 14th of October to settle that up and paid it?
A. I can't say he did, sir. Mr. Shaw came to my office or I met him on the street, I can't say which, but I know I spoke to him about what

had been on my mind a good deal about the risks on the open policy which was running, and it was running a long while, and he said he had no property there. I told him he should let us know when the risk terminated and the way the premiums were settled, and he told us the days the risks terminated, and we charged him up to three days.

Q. Then this open policy was running a long time after the risks had ceased?

A. Yes, sir; according to Mr. Shaw's statement.

103 Q. Well, when he paid you this premium, sir, did you have any talk with him about any other insurance? If he talked in relation to premium?

A. I made a remark to him that I did not like to have things run along in that way; that I should prefer he paid the premium up and settle with us before he went home.

Q. That you would want the premium paid before he went away.

Mr. HODGES. No, that is not what he says.

The WITNESS. I gave him to understand that I did not want policies running along for six or seven months after the risk had ceased without having the premium paid; I could not close up my books, and it kept them open the whole year, and I wanted it settled up before he went away.

Q. Were you agent for the Phœnix?

A. I was not.

Q. Nor for the Manufacturers'?

A. No, sir.

Q. Were you agent for any other company than the Relief at this time here?

A. No, sir.

Q. Had Mr. Shaw any business with you, or did you do any with him except as agent or except this specified in the open policy?

A. No; not to my recollection.

104 Q. You were not present on the 15th of October, were you, when this talk took place between Shaw and Colby. Were you there at all, sir, during this interview?

A. I knew nothing of it until I spoke to Colby about it.

Q. Did you ever see Shaw from the time he paid the premium on the 15th until after he went South this year?

A. I did not, sir.

Q. Was he in your office, to your knowledge, between that time and the fire?

A. From the time he paid the premiums on the open policy.

Q. From the time he had this talk on the 15th of Oct.?

A. Yes, sir; I saw him when he talked to me about getting the policy on the Manufacturers' Co.

Q. That was before this, wasn't it?

A. Before he paid the premiums?

Q. No, sir; before the talk on the 15th.

A. Yes; it was before the talk on the 15th.

Q. What was your custom, sir, with regard to returning to the Relief your monthly business?

105 A. We made up a sheet of recapitulation of the business done for the Relief during the month, and forwarded this sheet to the Relief Insurance Co.

Q. You say that was done monthly?

A. Done monthly.

Q. During what time in the month.

A. Well the business of one month we would make up and send it early, say before the tenth of the following month.

Q. Dou you know whether the transaction you had here in the month of Oct. were returned to the Relief before the fire?

A. I will not be certain about that.

Q. In whose handwriting is that, sir? (Handing witness a monthly sheet for October.)

A. Mr. Colby's.

Q. Did you know that this was sent before the fire?

A. I did not.

Q. Do you know whether it was sent in the regular course of business, one time or another?

A. It was sent in the course of business.

Q. Did you know anything about it—examine it, or have anything to do with it before it was sent?

A. I don't think I did.

106 Q. (By Mr. Abbott.) I want to put this question to you, sir: Whether you had any authority from the Relief Ins. Co. to make any other insurance except upon a written policy?

Mr. HODES. I object to that; if he had any authority other than the paper that is put in here, or other than is to be inferred from his custom of doing business, why that should be shown.

LOWELL, J. I think that is open to the same objection raised to some of your questions.

Mr. ABBOTT. I put the express question whether he had received any authority? I put it expressly; authority to make any insurance except on written or printed policies.

LOWELL, J. If he had any written authority it had better be produced, if you mean oral.

Mr. ABBOTT. I mean everything, written or oral.

LOWELL, J. Well, possibly in that form the question may be proper, whether he had any specific or express authority, oral. In writing, I suppose it should be produced.

Mr. HODGES. The objection, if we may be permitted to state it, is this, that they are asking him to state what possibly may be

107 limitations or restrictions to a general authority of which we have no knowledge, which by judicial decision does not answer.

LOWELL, J. I do not understand that they are asking him exactly that. I think a ruling, in one case, of the courts of Massachusetts is that evidence could not be ever received of that kind. I think this is carrying it rather far. My own impression is that the agent's authority may always be proved as one of the facts in the case; that would be my impression. I have not read that case lately. The agent's authority may always be proved as one of the facts of the case, although it cannot undoubtedly control a person dealing with the agent who had no notice of it, if it be a limitation of what it was held out to be. It is rather a nice question whether the evidence is admissable; but for that decision, I should say the agent's actual authority might be shown by either side. Whether there is estoppel—you see the point is this, and I do not see how it can be ruled as a point of evidence—if there is any estoppel of the defendant, that would arise on the whole evidence of the case, of which a part is only now before me. They may be pre-

108 pared to prove by and by that this was within the knowledge of the plaintiff, for all I know.

Mr. HODGES. We have no fears in this case, and we are quite satis-

fied with the law as to general agents, but we want to put a limit as to the tendency where this will possibly lead.

LOWELL, J. I should rule without any hesitation but for this decision, which I have not read lately, but there is a decision somewhere that it cannot be ever given in evidence, though I must say that is contrary to my impression.

Mr. ABBOTT. You are making that case work very severely, your honor. I scarcely think it goes so far as your honor thinks.

Mr. HODGES. I have before me this case—it is that of against the Mutual Insurance Co., in the 103' Allen's Reports, and the paragraph to which we refer to is district—and perhaps this is a' good place to present it to the court as any.

(Passage read.)

LOWELL, J. That is undoubtedly the rule of law in all courts.

109 Mr. HODGES. Now, the inquiry here is, had you any authority from that company to bind them except by written policy? How much or how little is to be attributed to his authority from this document we shall have ultimately again to consider at length, but is not the question exactly cutting upon that ruling of the courts of Massachusetts? and to the extent to which that is authority here we urge that objection.

Mr. ABBOTT. If your honor will examine that case I think you will find that decision is rather as to the effect of the testimony than as to the testimony itself.

LOWELL, J. But my difficulty is what I have stated before, that for all I know it may turn out that the plaintiff had, directly or indirectly, some notice of the limitation. I have another objection to the evidence, or perhaps there is another objection to the evidence which is in the same line of objection, and that is perhaps material, because an agent who has power to issue policies has undoubtedly power to——

Mr. HODGES. Let the question be put, subject to the ruling of the court in future.

110 Q. (By Mr. Abbott.) Now, Mr. Dow, had you express instructions from the company to make any other insurances except upon the written policies?

A. No, sir.

Q. You had not; did you in fact ever attempt to make anything on behalf of the Relief Insurance Company but written policies?

A. No.

Q. So that you neither had authority nor did you ever attempt to make any but written policies of insurance?

A. No.

Q. Did you have that or one like it—a copy of that card—given you at the time of your agency? (Handing a card of instructions to agents.)

A. I have no recollection whether I had that card or not, but I knew the general character of the company. If I am allowed to state it I will give my whole instructions from the company.

Mr. HODGES. It may go *dobens*.

111 WITNESS. The only instructions I received in relation to the issuing of policies were that I was not authorized to waive any of the previous conditions in the policy.

Q. (By Mr. Abbott.) And printed policies—these policies signed by the officers—were given to you, which you were to issue when you made any insurance?

A. Yes, sir.

Q. And then notify the other parties?

Mr. HODGES. Don't, don't.
Mr. ABBOTT. Why not?
Mr. HODGES. Because you are putting it into his mouth.
Mr. ABBOTT. Well, I know I am.
Mr. HODGES. Well, I don't intend you shall do.
Mr. ABBOTT. On cross-examination I can put any question I like.
Mr. HODGES. I don't think we have any such rule.

LOWELL, J. Undoubtedly you can put a leading question on
112 cross-examination, except that it is a question by the party who does not call the witness; but even if it was cross-examination, a leading question is one thing, and stating a fact and asking him if that is so is not a leading question. It is all within the control of the court, I understand.

LOWELL, J. Let it be understood that a leading question must be put interrogatively.

Mr. ABBOTT. I never heard it objected in a court of justice before that a statement might not be made in cross-examination and a witness asked if it was so.

Mr. HODGES. There are new things occurring every day to the most learned of us. This is new to my opponent, so I will not ask him,
113 but will ask more experience' counsel if they ever heard a witness asked, "He said to you, then, that you were not to do anything with these policies; you were to waive nothing; you were to be governed strictly and entirely by this?" I have seen a court allow these things, in the little experience I have had, where the witness showed himself entirely unwilling to make known what he did know, but never when the witness was dealing with frankness and sincerity to the court.

LOWELL, J. Well, as the question struck me, it was a summing
114 up of what the examining counsel thought was a fair result of the statement of the witness.

Mr. ABBOTT. Yes; and putting it to the witness. Then, Mr. Dow, I will ask you, whether you had any instruction either to waive anything that was in the written policy of insurance, or to make any insurance whatever, except by delivering written policy, one of these policies given to you? I mean for the Relief Insurance Company.

A. No, sir.

Q. And you were to return, were you not, to the company either a copy of the policy or a full statement of any risk that you had taken?

A. Those were my orders.

Q. And those orders were acted upon, were they not?

A. Yes, sir.

Q. Now, as to that particular entry alluded to by my friend, won't you please turn to it?

(Witness turned to the entry.)

Do you know that if any copy or statement in reference to that entry was ever sent to the company, it was made after the fire you have spoken of?

A. I don't know that it was.

115 Q. Don't you know in fact that it was not sent until after that?

A. I cannot swear positively as to that.

Q. Now, sir, did you ever, so far as you know, send any notice where the entry was, in the position that that entry is?

A. I think I did.

Q. Where; won't you give us a single instance?

A. Oh, outside?

Q. Yes, sir.

A. Oh, no, not outside.

Q. Where the entry was in the position that that appears to be, you never send any notice to the company?

A. No.

Q. Never?

A. No.

Q. And if you sent it in this case it would be for the first time?

A. Yes.

Q. Had you any authority from the company, sir, to give credit for premiums?

A. No, sir.

Q. And did you, for the corporation or the Relief Company, ever give credit?

A. I have given credit sometimes on my individual responsibility.

116 Q. On your own responsibility?

A. Yes.

Re-examination:

Q. (By Mr. Hodges.) Concerning the premiums paid on the open policy, the one that was spoken of at first; please turn your attention to that and tell me what the rule is as to that. For example, an open policy is made, and 50 bales of cotton entered on it so as to remain insured; they remain under insurance until they are sold, a month, if you please; in the mean time 20 other bales are entered, and they remain a month and a half, and so on, interlocking with each other. Now, when is the premium due on this insurance?

A. As soon as the term ceases.

Q. Well, as soon as each term, the 20, the 50, and so on?

A. If they are entered for an indefinite period, as soon as we are notified that the insurance is off, we expect to be paid.

Q. But in the mean time, while it remains on the policy, they remain under insurance, and the time for which they are so to remain is

117 indefinite, your custom, at all events, is not to collect the premiums?

A. We don't know what they are.

Q. But I don't know but there may be some rule by which you collect a portion of them.

A. No.

Q. Now, did you yourself settle that open policy with Mr. Shaw?

A. I don't think I did.

Q. You think it was done by Mr. Colby?

A. I think that the settlement—no. Let me see. I must have had something to do with the settlement myself, because I remember distinctly the conversation with Mr. Shaw in regard to the time that these risks had run, and I told Mr. Colby to settle with Mr. Shaw on Mr. Shaw's time.

Q. Now, I wish you would recall the circumstances, and, if you possibly can, tell us the state of the policy itself, the looks of the policy when you settled, where these entries were made.

A. Well, yes; I know the general look of the policy.

Q. Exactly; then will you tell me? As I understand the matter of these open policies, when an entry is made of cotton there is a place for writing on the back of the policy.

118 A. Yes, sir.

Q. And on that when it is removed it is cancelled or something done to indicate that it is removed from the rest?

A. Yes.
Q. Now, sir, that was the case in this.
A. Yes.
Q. Now, do you remember an entry on that position of the policy where the cancellations take place, an entry in pencil?
A. No, sir.
Q. You don't remember anything of that kind?
A. No.
Q. But you directed Mr. Colby to settle as Mr. Shaw said?
A. As Mr. Shaw stated at the time I spoke to him about it.
Q. When you took your agency had you at that time a conversation with the president of the company?
A. Yes, sir.
Q. Did he come there or were you in New York?
A. I was in New York.
B. Well, now, did you ever see a copy of this book until shown you here? (Showing witness a book of the company's rules.)
119 A. I cannot say that I ever did.
Q. Did you ever read the charter of this company?
A. I don't know that I have that one. I have read the charter under which companys in New York are generally governed.
Q. Their general laws?
A. Yes, sir.
Q. I understood you to say, in answer to a distinct question to a counsel on the other side, that the only instructions you ever received from the president of the company was when you became agent, and I now understand you to say that that was a conversation which took place in New York, and not here. I understood you to say that the only instructions that you received from him were that you were not to waive the terms of the policys that he handed to you. Did I understand you right?
A. Those were the instructions as to taking risks.
Q. Yes, sir; I alluded to risks. Those are the instructions he
120 gave you. Did you always collect your premiums before you delivered your policys?
A. No, sir.
Q. Did you always collect your premiums before you remitted to the company?
A. As a general thing so far as we were able to.
Q. Did you ever communicate any of your private instructions from the president to Mr. Shaw?
A. I think not.
Mr. HODGES. We now offer the entry.
(The book containing this entry was here put in as evidence.)

Cross-examined:

Q. (By Mr. Abbott.) I want to ask you whether turning your attention to the entry that your attention has been called to how soon did you know of that entry after it was made?
A. Sir?
Q. How soon did you know of that entry after it was made?
A. The same day or the next.
Q. Now I don't ask you what the conversation was, but whether you had a conversation as to the subject-matter of that entry with
121 Mr. Colby.
A. I asked him——

Q. I don't ask you what it was, but I ask you if you had a conversation with him in reference to it?

A. I had.

Q. I want to ask you now, further, sir, whether the rate for the month is larger or was it at that time universally larger or smaller than the annual rates?

A. The rate was smaller than the annual rates.

Q. But the percentage?

A. Oh, prorate, it was larger.

Q. This was the universal rule that you never issued a monthly policy pro rata at the annual rate.

A. No, sir.

Q. That was the universal rule with all insurance companys, was it not, so far as you know?

A. So far as I know.

Mr. HODGES. We now offer this entry, may it please your honor.

LOWELL, J. Is it objected to?

Mr. ABBOTT. Yes, sir; that will be objected to unless they
122 prove it by the handwriting of the man who made the entry. The precise objection is this, may it please your honor, that they now undertake to prove for the purpose of controlling the principal an entry made by the agent of the agent growing out of a transaction of the agent *if the agent* if the principal and the plaintiff in this case, the agent not being present in any way for the purpose controlling the principal. We say that cannot be done except by calling the party—and there is no claim that he cannot be obtained—who made that entry.

LOWELL, J. I do not quite understand the point of that objection.

Mr. ABBOTT. I claim that it is not admissable except with the testimony and for the purpose of confirming or explaining the testimony of the party who made this entry.

LOWELL, J. You mean it is not admissable as an entry at all, not as an independent entry. I suppose that depends on the other question, whether the agent had the power to employ this person to do busi-
123 ness for him. If he had, then it is his entry and it is sufficiently proved already, and is admissable. If it is a mere memorandum of somebody who was not authorized, why it is of no account any way; if the agent could not delegate the power to make the insurance, then it is no sort of consequence how it is proved or whether it is a memorandum or entry. If he can, it is sufficiently proved; there is no question about that, and is admissable. I understood the objection to be that the agent could not delegate the power.

Mr. ABBOTT. That is one of the points of the objection, your honor.

LOWELL, J. The fact that the entry was made has been proved and there is no doubt that entry was made by Mr. Colby—at least there is evidence enough to submit it to the jury—and at the time it purports to be made. There is evidence enough for that, and therefore it is sufficient to prove that Mr. Colby had authority to make that entry; and if he had not it matters not how it is proved, it would of no avail in this case. (To Mr. Hodges.) You think the agent can act by his clerk?

124 Mr. HODGES. I did not ask to be heard on this point. I thought it was so plain. This man says that Mr. Colby did all his work. How is it possible that any one is to stand here and say that the general agent of a foreign insurance company must with his own hand put down every entry that is made? I think the statement is enough.

LOWELL, J. But I apprehend the objection goes a little deeper than that; that is, whether he can delegate the power to take risks and make premiums.

Mr. HODGES. He has stated that he did so.

LOWELL, J. Well, I think the entry is admissable now at this stage of the case, because this objection, so far as it is an objection to authority, is an objection to the whole case, and should be ruled to the jury hereafter. In his evidence he says he spoke and talked a good deal about the entry on the same day, and I thought you were then going on to show ratification, but you did not.

Mr. HODGES. I infer ratification from that.

125 Mr. ABBOTT. I do not understand your honor to have ruled on the point whether an insurance-agent appointed by a corporation can appoint another.

LOWELL, J. No; I have not ruled upon that. I think there is evidence to go to the jury that this is Mr. Dow's entry, though it might have been made more certain.

(The entry was then admitted as evidence and shown and explained by counsel to the jury.)

Testimony of James M. Keith.

Q. (By Mr. Barrett.) Mr. Keith, your name, if you please.

A. James M. Keith.

Q. You are a counsellor of this court and a member of the Suffolk bar?

A. I am.

Q. Were you at any time employed by the plaintiff in connection with this matter? If so, when?

A. On the 15th of November, 1872, I received a telegram from Mr. Shaw, who was then at Jefferson, Texas, and in consequence of

126 receiving that dispatch I went to Mr. Dow's insurance-office, No. 15 Water street, where I found Mr. Colby in attendance, and I asked him if Mr. Shaw was insured.

Mr. ABBOTT. Now, your honor, we propose to object to any conversation between Mr. Colby or Mr. Dow, or any one else, and Mr. Keith.

Mr. BARRETT. For the present, Mr. Keith, I will draw your attention to anything that you did at the request of the plaintiff in respect to making proof of his loss; what documents, speaking generally, you presented upon that subject to the officers of the defendants' company, and what consideration they gave to them, and what the result of your proceedings with them was.

A. In consequence of an answer that was given to me by Mr. Colby at the time that I applied to him, I telegraphed back to Mr. Shaw that his insurance was all right.

Mr. ABBOTT. That we object to, your honor. I think brother Keith knows perfectly well that is not competent testimony.

127 Mr. BARRETT. Well, sir, if under any instructions from the plaintiff you presented to the officers of this company proof of loss, will you state what you did in that regard?

A. I enquired for a blank of the proof of loss at the time I went into this office. They had none at that time. A few days subsequently to that I went to this office, and Mr. Colby furnished me with a blank of proof of loss, and wrote in himself into the blank the name of the company in which Mr. Shaw was insured, and also wrote in the date of the fire in the city of Boston. That I forwarded to Mr. Shaw, and he mad' oath to it, and returned it to me, and I filed it with the adjuster of the company, W. Gilbert, on the 9th or 10th of December.

Q. The person whom the company had sent on here to adjust their losses in this fire?

A. Yes; he was adjusting all their losses here, and had an office at the time on Beacon street, and at his request—he desired some other evidence than simply the affidavit of Mr. Shaw.

Mr. ABBOTT. That I object to—the evidence of what the adjuster said.

128 Mr. BARRETT. Did the adjuster ask you to furnish further preliminary proof of loss?

A. He did request it.

Q. And did you furnish further?

A. I first furnished the affidavit of Mr. Ball, of Mr. Ball's clerk, the shipping-clerk—all their statements in regard to the amount of goods that were in their store awaiting shipment at the time of the fire; that I first did.

Q. Within what time of presenting Mr. Shaw's affidavit?

A. I think I furnished the affidavit on the 9th, and on the 10th I furnished the affidavit of Mr. Ball and of his shipping-clerk.

Q. Then on the 9th December you furnished Mr. Shaw's affidavit, and on the 10th that of Mr. Ball?

A. Yes, and also that of his clerk. The adjuster then said——

Q. Not what he said, but did he request further preliminary proof?

A. In consequence of what he stated I procured the affidavits
129 of thirteen different manufacturers and firms and *and* shipping-agents, at the time it was a very great labor to get them, because the fire had disturbed everything, and it took several weeks to get the affidavits of these men; but I procured thirteen affidavits of different firms and individuals who had sent goods there to Mr. Ball's, to be shipped from that point to Mr. Shaw just previous to the fire.

Q. That you did at the request of the adjuster?

A. Yes, sir; and I also sent on to Mr. Shaw to tear out of his book the bills and send them on to me.

Q. Now, in filing these affidavits did you furnish them all at once, or from time to time, as you procured them?

A. From time to time.

Q. So that you were repeatedly at the office of the adjuster whenever you had any additional proof of loss?

A. Yes; and after I had got them all in, I think up to the 23rd of December, I had filed all these affidavits, and about the same
130 time I had got the original bills which Mr. Shaw had forwarded from Texas, and then I had numerous interviews with the adjuster, he agreeing to fix a time when he would upon the matter, and on one occasion when I went in Mr. Gilbert himself was busy. He had appointed the time for my coming and going over the items of the loss, and he requested Mr. Winterton, who was there in the office with him, and who he said was his partner, to sit down with me and go over the items of the losses; and that time I went over each individual item, and with each affidavits. I had them listed on the back of an envelope; and as I read the affidavits, proving each individual item, Mr. Winterton checked them until they were all checked.

Q. This is the very envelope which was checked, is it?

A. It is, showing the loss to be $——

Q. At about what time was that, sir?

A. That was about the 24th of December.

Q. So that up to that time, and in the course of furnishing the adjuster these affidavits, you were repeatedly in at his office, and in
131 conversation with him about the case, as I understand you. Now, at any time up to the period you speak of, when you went over

with Mr. Winterton each particular affidavit, and when he checked them on the back of the envelope, up to that time had a word been said, had anything been said, by the adjuster, intimating that there was no contract of insurance here?

A. Not the first word.

Q. The sole question that was under consideration was the amount of the losses and the effect of the losses.

Q. (By Mr. Abbott.) If you please, is that competent testimony to bind a corporation, whether the adjuster says or does not say anything in reference to the liability of the company?

LOWELL, J. I suppose not; but I did not hear any objection, and so I put down the answer.

Mr. ABBOTT. Well, I object to it now.

LOWELL, J. I do not see how anything the adjuster says can affect the validity of the contract.

Mr. BARRETT. My only purpose was to show that during Mr. Keith's interviews with the adjuster there was no word said hinting
132 that there was no contract here. The adjuster dealt with him as though the' was a contract of insurance at the bottom.

Mr. ABBOTT. Whether anything was or was not said, it seems to me incompetent to bind parties because something was said or was not said by a party having no power to bind the parties.

Mr. BARRETT. This was a foreign company, having an agency in Boston and sending here an adjuster, with the powers of a general agent in the matter, to adjust losses, and the point is that the company's principal agent at that time in Boston dealt with Mr. Shaw's agent.

Mr. KEITH. Without an intimation that there was no contract whatever that appears to be admissible and competent testimony, we are content to leave that, so far as it will go, to weigh with the jury upon the point that there was a contract, and that the agent of the company for months negotiated with us in respect to the losses.

LOWELL, J. That you can speak of in your argument hereafter.

133 Mr. BARRETT. It seemed to us that it confirmed the testimony in respect to the making of the contract and the completeness of it. We propose now, may it please your honor, having led our inquiry up to this point, to show from Mr. Keith what the final answer was that was received by him from the adjuster, and from the company, in answer to the preliminary proofs that he had produced.

LOWELL, J. Well, anything you have from the company, I suppose, will not be objected to.

Mr. Barrett called for the letters to Mr. Keith, and letters of the 10th of January and 13th of January were produced—one being a letter to the adjuster and the other a letter to the company.

Mr. Abbott objected to the letter to the adjuster, as he had no authority to bind the company with reference to any contract.

Mr. Barrett read the letter of January, 1873, addressed to the president of the Relief Company in New York by Mr. Keith.

Mr. KEITH, (witness.) I never received any reply to that, but I subsequently received one from the attorney of the company. (A let-
134 ter dated January 25th, 1873, written to Mr. Keith, in reply, was then put in.)

Q. Is that the first intimation you had from the company that they disputed Mr. Shaw's claim?

A. The first intimation of the kind I had was in the reply of Mr. Gilbert, on the 23rd of January, two days prior to that, when he sent back

the original vouchers of Mr. Shaw which I had left with him for his examination.

Mr. BARRETT. With the exception, then, sir, of that intimation from Mr. Gilbert, this letter of the 25th of January is the first intimation you had that this company disputed the claim of Mr. Shaw?

A. It is.

Q. Mr. Keith, in regard to the statements in the letter addressed by you to Mr. Pinckney, the president of this company, are the statements I have read from that letter true?

A. They are true, sir; made from my memorandum at the time.

Cross-examination:

135 Q. (By Mr. Nutter.) Mr. Keith, that letter, which has just been read, is the first communication you made with the company in regard to the losses?

A. It is the first I made with the company. As such I had previous communication with their adjuster.

Q. Yes, sir. Outside the adjuster you had made no claim upon the company or had any communication with them?

A. I had no communication with them, except through the adjuster, and then at Mr. Dow's office.

Mr. DOW recalled.

Q. (By Mr. Abbott.) You answered, in the question I put to you in regard to this entry on the book, that you had a conversation within a day or two with Mr. Colby in relation to it?

A. Yes, sir.

Q. Did you or not direct Mr. Colby to return this as a complete and accomplished insurance to the company, or was that the reason why it was not returned?

A. That was the reason why it was not returned.

Q. Did you not direct it, sir, not to be returned specially?

A. He knew my views about such things. Whether I positively directed him to return it I cannot say.

136 Q. Well, sir, you assented to his not returning it, did you not, sir?

A. Well, sir, shall I tell the words Mr. Colby used to me?

Mr. HODGES. No, sir; do not tell the words.

Q. Well, I will put this question, may it please your honor. Did you in any way ratify this entry as a binding act of the corporation after you knew of it?

A. I ratified it for the time being.

Q. As anything binding, that you respected, and, if so, why did you not send it on?

A. I did recognize it as binding for the time being, with the understanding that Mr. Shaw was to come in within a few days.

Q. But he did not come in?

A. He did not come in.

Q. And you never returned it to the insurance company?

A. No, sir; because I did not consider the contract fulfilled until Mr. Shaw returned and fixed it as he agreed to.

Q. So you did not return it, nor direct it to be returned, because it was an incomplete contract.

A. Yes; because it was an incomplete contract.

137 Q. (By Mr. Hodges.) Did you know it was not returned to the corporation?

A. I gave evidence that I did not know it was returned to the corporation until after the fire.

Q. You testified before that you did not know?

A. Not at the time.

Q. Let us understand your statement. The first communication you knew of being made concerning that was made by you after the fire, and the time you made it you could not tell, but it was within some fifteen days after the fire; that is as I understand it exactly.

A. Yes, sir.

Q. Now, when you are asked whether this or that was the reason why you did not return it to the company, how can you say that when you did not know it was returned to the company?

A. Well, I did not know it was returned to the company at the time, but I considered it was binding on the company for a short time, and the gentleman said he would come in and fix it, but he did not come.

Q. Now, we will put a case. Suppose a fire had occurred that night, on the night of the 15th of October, what would have been
138 your statement about it?

A. I don't think I am competent to answer that question.

Q. Well, that was the very reason why I put the question to you. Whatever judgment you had about it grew, of course, from your talk with Mr. Colby. All that you know about it was that?

A. Yes, sir.

Q. And for the time being you ratified it, and considered it binding, provided Mr. Shaw had come in as Mr. Colby indicated?

A. Yes, sir.

Testimony of T. B. Goodrich.

Q. (By Mr. Barrett.) Your name, sir, is T. B. Goodrich?

A. Yes, sir.

Q. And your business, if you please?

A. My business is an insurance-agent, at 40 State street.

Q. How long have you been engaged in that business?

A. Eight or ten years; about that.

139 Q. You are familiar with the mode in which the business of fire-insurance is conducted, and, especially, as conducted by foreign companies through agencies in Boston.

A. I am some; yes, sir.

Q. Well, sir, what do you know or believe, from your experience in that business and the customs and usages of it in Boston, what do you know or believed to be the usage or custom in Boston, respecting the commencement of risk after the terms of a policy have been agreed upon between the agent and the applicant?

Mr. ABBOTT. A single word. I object to that on the ground, in the first place, that the belief of the witness is entirely immaterial in reference to the existence of custom. It is what he knows, and not what he believes about things which may be without his personal knowledge. Further than that I do not see the applicability here in this case of custom at all. They put their case upon an express contract, which they have offered to prove. If they prove anything, it must be an express contract, not a contract depending upon custom or anything of
140 the sort. They declare on and offer to prove an oral contract to insure. Therefore I do not see the pertinency nor the office which evidence of usage is to fulfil' in this case.

Mr. BARRETT. If your honor please, in reference to the form of my

question, I beg leave to call the attention of the court to the case of Hamilton vs. Nickerson, in the 13th of Albon's Reports. (Counsel proceeded to read extracts from the decision in that case.) This as to the form in which I took the liberty of putting my question. In the same volume, close at hand, I would like to refer the court to the case of Baxter and the Massasoit Insurance Company, in which certain customs were held by the court to be competent evidence in the case.

(Counsel read extracts from the decision in this case.)

Mr. ABBOTT. I am aware of this opinion, and never thought it satisfactory. I still believe there is a distinction, not nice and metaphysical, but founded on the plain rules of evidence, that a witness is not to testify to his belief as to usage or custom, but as to the fact; and, more
141 than this, I am sustained by the current of opinion in the courts on this point, which is rather to restrict that enlarge the sphere as to usage. I do not believe that the evidence of the belief of the witness is any more than evidence of his belief on anything else. He is not an expert, notwithstanding the decision quoted. But on the other matter, may it please your honor, on the matter of custom, the plaintiff declares upon an express oral contract, and he has offered evidence to prove an express oral contract, not depending upon usage or custom at all, but depending upon the express contract between the parties. Now, we say he must stand or fall by that, and cannot save himself by attempting to put the evidence of a custom or usage where there is a contract covering the whole subject-matter.

LOWELL, J. I don't think that quite goes to the root of the matter, &c., &c. (After a long discussion, the evidence was admitted and the exception saved.)

Q. (By Mr. Barrett.) Mr. Goodrich, I will repeat my question. What is the usage in the business of fire-insurance, particularly fire-insurance made by and with foreign companies having agencies in Boston,
142 respecting the commencement of the risk?

A. When it attaches?

Q. Yes, when it attaches, supposing the terms have been verbally agreed upon between the agent and the applicant.

A. We have a rule, sir, in all our offices in Hartford, that an insurance always commences at twelve o'clock, so that if it was insured at eleven it would not commence until an hour afterwards, at twelve o'clock. We make it at twelve o'clock that day.

Q. Although the policy remains unwritten and the premium paid?

A. Yes.

Q. Well, sir, the preliminary contract that ordinarily precedes the written policy, as a general rule, according to the usage in Boston, is it an oral or written contract?

A. Either, sir. Some companies issue a binder, but we don't.

Cross-examination:

Q. (By Mr. Nutter.) I understand you to say that there is no uniform custom?

A. Well, I understand there is, sir.

143 Q. Well, you have just stated, haven't you, that *that* one company does one thing and one another?

A. In reference to the binder.

Q. Didn't you say some used a binder?

A. Yes, some companies; but we do not.

Q. Then there is no uniform custom in this city with regard to such contracts; some require it to be a binder and some do not.

A. It may be or may be not.

Q. Didn't you state it so?

A. I said that some companies have binders and some not.

Q. Then there is no uniform custom as to when these contracts begin, where they end, or how long they last, or when they bind, is there?

A. I understand that when you cover by agreement, when you insure $5,000 on a certain piece of property in a certain place, the moment you get that contract understood it is bound without any writing passing.

Q. But you understand that certain companies do require a binder?

A. I understand that certain companies do, but we do not.

144 Q. Well, sir, do you know anything about the relative proportions of those which require it one way or the other?

A. I do not, sir; I think there are very few who do.

Q. Now, in companies that do not, sir, and there is an oral contract made, how long does it last, a contract of insurance; is there any custom about that, any usage?

A. That I don't know.

Q. How long an oral contract of insurance shall stand without anything being done?

A. I will state to you, sir, that now at this present time there are frequent cases of that kind. Parties come in and our rates are not fixed, and we bind first an' frequently wait a month for the rate, so there is no time fixed.

Q. Well, is there any usage, any uniform and invariable usage, in this city with regard to any length of time that an oral contract shall exist?

A. I do not know of any.

Q. You do not know of any?

A. I do not know of any particular time.

Q. That depends upon the circumstances of each particular case?

145 A. Yes.

Re-examined:

Q. (By Mr. Hodges.) Those binders that you speak of, are they not always in mutual companies? Do*u* you know any but mutual companies that have binders?

A. Yes, sir, I think that some of the other companies have, but that I am not positive about.

Q. Do you remember seeing any from any foreign company here?

A. I suppose I have.

Q. Well, sir, what I want to get more particularly at is, in any of these companies who have binders, don't they, in many instances, do just what you have been speaking of, take insurances without binders or anything else, except coming to an agreement?

A. They say to a person, we bind you for $10,000, and if he wanted it in writing I would give it.

Q. And if he didn't you would not?

A. No, sir.

Q. And in those companies where there are binders, still do they not go along in many and frequent instances without them?

146 A. I can state a case, if you like, in our own office.

Mr. ABBOTT. That we don't want.

Q. (By Mr. Nutter.) Suppose a stranger in the city to go into the office and make this contract for insurance orally and nothing further is heard from him, and it turns out that within a week or ten days he has left the city, is there any usage or custom in the city of Boston to

constitute that a binding contract of insurance for any length of time?

A. We have never had a case of that kind, and the usage, I don't know what it is.

Q. Is there any usage, take any man that comes?

A. If a man come in like that, it would look to me as if it would run out.

Q. Well, if you never heard from him again, would you consider it a binding contract?

A. It is binding at the time, but——

Q. Well, sir, how long; is there a uniform custom to bind that for any length of time or number of days, without anything further being said?

A. There is no particular time to my knowledge unless agreed upon at the time.

147 Q. Well, sir, but if it is not agreed upon at the time, is there any custom?

Q. I don't know of any custom, sir.

Q. (By Mr. Hodges.) If a party goes to an office and a memorandum-book is opened and a company recommended, and the amount of property agreed upon, and the place where that property is is taken and entered, and the party says, "Am I insured from this time?" and the man says, "Yes," and says nothing about money and nothing about policy; he is told that when the risk terminates, "when the property is removed and taken up the river, I will signify it to you, and cancel it," and he goes away, won't that insurance last 10 days? What is the custom?

A. I suppose it would.

Q. Wouldn't it last a month?

A. I suppose it would.

Testimony of Mr. Henry A. Ball.

Q. (By Mr. Barrett.) What is your name, Mr. Ball?

A. Henry A. Ball.

Q. And your business?

A. A shoe-manufacturer.

Q. In October, 1872, you were at 75 Pearl st.?

148 A. I was.

Q. To your store Mr. Shaw had all his goods sent for shipment?

A. Yes, sir.

Q. When Mr. Shaw was in Boston in that year, just before he left for Texas, there was a large stock of boots and shoes in your store, and you were his general forwarding agent?

A. Yes, sir.

Q. Were you in the habit, at that time, of paying his little bills?

A. Yes, sir.

Q. And you paid the bills that he had left in small matters?

A. Yes.

Q. Had you any directions from him in reference to this policy of insurance at the Relief office to communicate with Mr. Dow in respect to that policy when the goods were shipped?

A. Yes, sir; he said when the goods were shipped he would notify me, and I was to notify at the office, so that the policy could be cancelled.

Q. If any premium had been demanded of you on account of

149 Mr. Shaw, should you have paid it?

(Objected to.)

Q. Was the understanding between you and Mr. Shaw such that you would have considered it your duty to Mr. Shaw to have paid the premium of $3 if it had been demanded of you?

(Objected to.)

Q. Mr. Ball, are you familiar with the usuages and customs in Boston under which the business of fire insurance by foreign companies having agencies here is conducted?

A. No, sir.

Q. You are not familiar with those usuages?

A. No, sir.

Testimony of George W. Reed.

Q. (By Mr. Barrett.) You were sworn yesterday. Your name is Mr. George W. Reed?

A. Yes, sir.

Q. What is your business?

A. Insurance.

Q. Where, sir?

A. State street.

Q. How long have you been engaged in that business?

A. Four years.

150 Q. Have you become familiar, in that time, with the usuages and customs of the business in Boston?

A. Some.

Q. Well, sir, what is the usage, if you know, respecting the commencement of a risk after the terms have been verbally agreed upon between the agent of the insurance company and the applicant?

A. The risk would commence at the time agreed upon.

Q. Notwithstanding the policy has yet to be issued?

A. That is always understood. That follows.

Q. If a party goes into an insurance office, applies for insurance to a certain amount upon certain goods, and the company or the agent agree to take the risk and agree upon the rate and enter it, and make a memorandum of it upon the books, in such a case as that, when, according to the custom and usage in Boston, does the risk commence?

A. It commences at the time agreed upon between the parties. It might be two days in advance.

Q. Suppose there is no particular agreement?

A. Then it would commence at that time when they settled it;

151 and if a fire occurred afterwards, they would be bound by it.

(Mr. Abbott objected to the testimony.)

LOWELL, J. He is not proving any custom at all. He says if it is agreed to begin when it is agreed, and if it is settled to-day, the risk begins to-day. He has not proved any custom as yet.

Q. (By Mr. Barrett.) I ask you, Mr. Reed, that, supposing an applicant for insurance goes into a duly-authorized agent's office to take risks and applies for a given amount of insurance upon specific property, and the agent agrees to take the risk in a particular company, and the time and the rate of premium are agreed upon, and a memorandum made in the agent's books, and nothing is said and no particular agreement is made at the time as to when the risk commences, is there a usage or custom that determines the time when that risk shall commence?

A. There seems to be some usage.

Q. Well, is there any custom that controls that in the absence of stipulation?

A. A man who effects insurance and wants it at any particular time, he says so.

Q. But suppose a man goes in and says, "I want insurance for
152 $5,000 on my stock of goods in 45 Pearl street," and they say, "We will take it," and they enter it on the books, is there any time fixed when the risk would commence?

A. Yes; that would commence at the time it was entered.

Q. All you mean to say is that an express agreement settles the question. If there is no agreement there is a usage that, in a case like that I have stated, the risk commence forthwith?

A. Yes, sir; at once.

Q. And if the person is a gentleman known to the agent dealing with him, and with whom he has dealt, without any reference to the payment of the premium at the moment?

A. Yes.

Cross-examination.

Q. (By Mr. Nutter.) Mr. Reed, is there any custom uniform in Boston as to how long a contract of that kind is going to bind him?

A. No, sir.

Q. That depends upon the circumstances of the case, does it?

A. That depends upon the circumstances.

Q. Then, if a man goes in, has this talk, and wants this amount insured, and fixes on his premium, and nothing more is heard
153 from him in relation to it, there is no custom how long that shall continue binding?

A. No.

Testimony of Wm. B. Sears.

Q. (By Mr. Barrett.) Mr. Sears, what is your full name?

A. William B. Sears.

Q. Your business, sir, and place of business.

A. Agent of the Insurance Company.

Q. How long have you been engaged in that business?

A. Since 1864; about nine years.

Q. Do you know the usages and customs prevailing in Boston in that business?

A. I have had some experience during that time.

Q. Is there a usage respecting the commencement of a risk in cases where the applicant has made his application for a given amount of insurance upon particular property and in a particular company, and the risk has been agreed to be taken by the agent, and the rate agreed upon? Is there any usage or custom, where it not expressly agreed when a risk shall commence, that determines it?

A. If you ask for $5,000 or $10,000 insurance, I should say yes, and your insurance would commence from the time of the application.

154 Q. From the time of the application?

A. Unless otherwise expressed.

Q. Is that generally the custom which obtains in Boston in reference to fire insurance?

A. Yes; unless some written application was made to fix it some days later.

Q. But a verbal application.

A. A verbal application would apply at the time it was made.

Q. That is the general usage in Boston?

A. Yes.

Q. And applies as well to the foreign offices having agencies in Boston?

A. Yes; unless I notify the insured to the contrary. My company may object to the risk, and I may find it necessary to notify you that my company objects to carrying that risk.

Q. The policy has not yet been issued, nor premium paid?

A. That does not affect the insurance.

Q. Suppose there is no express agreement—confine your example, if you please, to such a case—when would the time commence?

A. It commences on application, verbal or written.

Cross-examination:

155 Q. (By Mr. Nutter.) How long does it last? If there is any uniform custom in Boston, what is it?

A. It lasts in Boston till the assured is notified to the contrary.

Q. Then, an oral contract for insurance is perpetual?

A. That is your construction.

Q. I ask your construction. Is that the usage, that an oral contract is perpetual?

A. There is but one kind of insurance that is perpetual.

Q. Is it the custom that an insurance on an oral contract lasts without any termination?

A. It would last until the end of the agreement to insure the person, or until he has notified to the contrary the party that effected it with him.

Q. Without any payment of premium or any writing whatever? On this talk the contract has always existed? That is the usage, is it?

A. As I understand it. It may be a mistake, or want of funds, or some reason unknown to the agent that the premium is not paid.

Q. (By Mr. Abbott.) Not what you do yourself, but what is the uniform usage?

156 A. I understand it to be the uniform usage to notify a man that he is not assured, otherwise he cannot tell that he is assured or not assured. I had several cases occur of this kind.

Testimony of Henry A. Brown.

Q. (By Mr. Barrett.) Your full name?

A. Henry A. Brown.

Q. Your business?

A. Insurance agent, on Devonshire street.

Q. How long have you been in that business?

A. Twenty-odd years.

Q. As insurance agent?

A. Yes; agent and broker.

Q. You are familiar with the usages of that business in Boston?

A. I have my own experience, sir.

Q. To save time, I will ask you if you heard the testimony of the last witness?

(Objected to.)

Q. Very well, Mr. Brown, what is the usage or custom in that business, as you know or understand it to be, in respect to the commencement of a risk where an application is made for a given kind of insurance upon certain property and the agent of the insurance company has agreed to take the risk, and the rate has been agreed upon, and the time nothing being said about when the risk is to commence,

157 what is your understanding of the usage in Boston in regard to the commencement of the risk?

A. I don't know what the usage might be. I think——

Mr. ABBOTT. No, no.

Mr. BARRETT. Suppose there is no stipulation, no contract, that the policy shall commence at a given time. A party goes into an insurance office and asks for $5,000 insurance for a given time on certain property, for a month or a year, and the risk is agreed to be taken by the agent; when does that risk begin, according to usage?

A. I am not aware of any usage that would control that.

Testimony of George James.

Q. (By Mr. Barrett.) Mr. James, what is your full name?

A. George James.

Q. What is your business, sir?

A. A manufacturer of boots and shoes.

Q. Where, sir?

A. Boston.

Q. Have you had occasion, in the course of your business, to obtain insurance?

A. I have, sir.

Q. At various times and to a considerable extent?

158 A. I have, sir.

Q. Are you familiar with the usages and customs pertaining to that business?

A. Somewhat so.

Q. What do you understand or know to be the custom in the business of fire insurance?

(Objected to.)

Q. How many policies of insurance do you ever have occasion to take out?

A. I generally take out 4 or 5 or half a dozen a year for $15,000 or $20,000.

(The witness was, after discussion, dismissed as not being competent to give evidence as to the usage.)

Adjourned to 2 o'clock.

AFTERNOON SESSION.

Testimony of Charles Eliot Guild.

Q. (By Mr. Barrett.) Your full name, Mr. Guild?

A. Charles Eliot Guild?

Q. And your business and place of business?

A. State street; insurance agent.

Q. How long have you been engaged in that business?

A. Ten years, sir; and more than that—ten or eleven years.

159 Q. And you are familiar with the usages and customs prevailing in Boston in that business?

A. Yes, sir.

Q. Well, sir, what is the custom, where the applicant applies for insurance upon property to the office or to the agency and the terms are verbally agreed upon between the parties, as to the commencement of the risk?

A. If nothing is specially said, the risk would be held to be binding

immediately upon the conversation. Sometimes days are stipulated, but if nothing is mentioned, I should consider——

Mr. ABBOTT. O, consider! What is the usage?

Mr. BARRETT. State what you know or understand to be the usage.

A. I believe that to be the usage, and my experience has been very large.

Cross-examination:

Q. (By Mr. Nutter.) Is there any uniform custom, Mr. Guild, as to the length of time that a talk of that sort is binding, nothing being ever said or heard beyond that?

A. No; I should say there was no custom. I should think it was difficult to prove any custom.

Q. As to its binding any particular length of time?

A. No, sir.

160 *Testimony of George F. Osborne.*

Q. What is your full name, Mr. Osborne?

A. George F. Osborne.

Q. And your business and place of business?

A. to the Independent Fire-Ins. Com.

Q. How long have you been familiar with or engaged in the insurance business?

A. I have been there for 26 years.

Q. And are familiar with the usages and customs that prevail in Boston in that business?

A. Yes, sir.

Q. When an applicant goes into an office or into an agency and applies for insurance, and the terms are verbally agreed upon between the applicant and the agent or proper officer of the company, is there any usage or custom which determines the commencement of the risk?

A. If it is accepted by both parties—bound at once.

Q. Bound at once if the terms are verbally arranged by both parties?

A. Yes; otherwise it would not be accepted.

Cross-examination:

Q. (By Mr. Nutter.) I will ask you, as I asked Mr. Giles, whether there is any custom where a verbal talk of that sort is made and
161 nothing is heard of it afterwards?

A. We should consider it not binding until concluded. A mere conversation is of no account, of course.

Q. But suppose there is this conversation and an applicant wants insurance at a certain rate on certain property at a certain place, and nothing is heard of him again, is there anything that makes that a binding contract for any length of time?

A. It would not be taken for any length of time at all, the way you put it, I should say.

Q. He, after coming in and saying, "I want insurance for so much," fixing the article to be insured, the premium, and so on, is never heard of or seen again. Is there any custom making that a binding contract on any insurance office in existence?

A. I don't believe——

Q. Now, sir, if there is any limitation fixing how long that policy would hold?

A. I don't know of any other custom than that.

Q. Do you know of any uniform custom prevailing in Boston?

A. I should say that is the custom, that the company is held.
This concluded the testimony for the plaintiff.

162 Mr. Nutter then opened for the defence.

Testimony of William W. Colby.

Q. (By Mr. Nutter.) Mr. Colby, where is your present residence?
A. Portland.
Q. And your business?
A. I am now in the railroad business.
Q. What railroad?
A. The Central Railroad.
Q. And clerk in their office?
A. And clerk in their office.
Q. What was your business and where were you on the 15th of October, 1872?
A. I was in Boston and in the insurance business, working for Mr. Dow.
Q. How long had you been in the insurance business then?
A. About fifteen or sixteen years.
Q. How long had you been with Mr. Dow?
A. About one year.
Q. How long have you known Mr. Shaw, this plaintiff? When did you first know him?
A. All my acquaintance with him was in the office. Probably
163 I have seen him ten or twelve times.
Q. Well, sir, when did you first know him?
A. I cannot give the dates.
Q. About how long?
A. I should say about four years ago I first knew him; about the last of '69 or the beginning of '70.
Q. Did you see Mr. Shaw when he came into your office on the 15th of October? In the first place I will ask you where the office of Mr. Dow was on the 15th of October, 1872?
A. On Water street.
Q. Coming from Washington street, how soon did you arrive at it?
A. Eight or ten doors from Washington street.
Q. How, sir, as relates to the first block on Washington street?
A. It is on the right-hand side.
Q. Now, sir, did you have a talk with Mr. Shaw on the 15th of October, 1872?
A. Yes.
Q. Will you please tell just what took place on that occasion? Give us the language, if you can. If not, tell us substantially what took place.
A. Mr. Shaw came into the office and said to me that he was purchasing goods——
164 Q. If you please, was anybody with you?
A. No, sir.
Q. Was anybody in the office with you?
A. No, sir; I was alone.
Q. Now go on.
A. Mr. Shaw came in and stated that he was purchasing goods to be shipped to Texas, and asked me if we could grant him an open fire-insurance policy. I told him we could; that is, if we found, on in-

spection, that the risk was a desirable one for our company we could give him an open policy. He then stated that the principal part of his stock would be boots and shoes, and that they would be stored at Mr. Ball's, on Pearl street. I then said that we could grant him an open policy, taking our full limit of $5,000. Then said he, "As fast as I make any purchases which are sent co-ofered"—co-ofered is the term—"I will come in and report to you and you can indorse them on this policy." That was the statement on which I said to Mr. Shaw that we would give him an open policy; that he was to report the risks as the goods went there. Mr. Shaw then left, and I did not see him
165 again. He never reported any goods.

Q. Whether he said anything, sir, about coming in again before going away?

A. He said he would come in before he went away—before he left for Galveston—to complete the open policy and pay the premium.

Q. Well, sir, whether any length of time was mentioned between you and him that this risk was to run?

A. No, sir.

Q. Whether any rate of premium was talked of between you and him that was to be charged?

A. No.

Q. This memorandum is in your handwriting, is it? (Showing witness entry-book before put in.) In whose handwriting is that line right along there?

A. It is in my writing.

Q. (By a juror.) Do you say it is your handwriting, sir?

A. Yes.

Q. (By Mr. Nutter.) Part is in ink and part in pencil. Will you explain in regard to that; how it happened to be made part in pencil and part in ink?

166 A. I received an application for an open policy, and I merely carried this down here, waiting for him to come in and say, "Yes; I will complete the open policy."

Q. Well, sir, whether the part written in ink was agreed upon?

A. Oh, yes.

Q. Now, sir, how comes the amount to be written in pencil?

A. Well, sir, the custom is—we have short rates, you know, on a month; even our rates for five days would be based on the month.

Q. Then the short rates are fixed by the month?

A. The month is the lowest.

Q. Then there is a writing in the margin about calling on Ball. Was there anything said about calling on Ball between you and Mr. Shaw?

A. I cannot answer as regards that other than it being in this margin. Here is my memorandum for a surveyor's risk. (Pointing to book.)

Q. Do you recollect whether there was any talk between you and Shaw as to that?

A. Not at all.

Q. Nothing as to calling on Ball as his agent, or anything of that sort?

A. No; nothing at all.

167 Q. Whether you gave Mr. Shaw anything in writing at that time?

A. No, sir; I did not.

Q. Whether there was any conversation with relation to the name being put down at all?

A. No, sir.

Q. Who made the entry which is above there? (Manufacturers' Insurance Company, E. A. Shaw.)

A. It is mine.

Q. What was your practice, sir, in regard to reporting to the office in New York; monthly?

A. Our practice was to report as early in the month as we could; from the first to the fifth, and along there.

Q. What had been done the preceding month?

A. Yes, sir; all business.

Q. Did that fall principally in your way?

A. Yes, sir; that was my business.

Q. Well, sir, will you look at that and state whose handwriting it is in? (Showing witness a monthly report.)

A. That is all mine.

(Mr. Nutter now offered this account sent to the Relief in evidence, but it was objected to, as well as all the testimony concerning it.)

Q. (By Mr. Nutter.) Well, as relates to the fire on the 9th of November?

168 A. My impression is that that account was all complete in our office one or two days.

Q. Before the fire?

A. Before the fire.

Q. Did you have any talk with Mr. Dow in relation to this or this record as to the Relief and Mr. Dow?

A. Yes, sir.

Q. Well, what did he say, sir, in relation to reporting that to the company?

(Objected to, but allowed, the exception being reserved.)

Q. (By Mr. Nutter.) Well, sir, if Mr. Dow has stated anything to you about this memorandum being erased by the company, what did he say? Did you have any talk with him about it?

A. This was the time I had my report ready to forward to the company. I asked Mr. Dow what I should do with this risk. He said I could not number any policy for it, as he had no risk, that is, no special risk, except under the open policy, and Mr. Shaw had reported nothing.

Mr. HODGES. Do not state what Mr. Shaw has reported.

169 WITNESS. Well, he said I had made no insurance for Mr. Shaw that he could report to the company.

Q. (By Mr. Nutter.) Did you have occasion to take down the Directory to ascertain anything—any place or name?

A. Not that I remember.

Q. Whether there was any mistake made by you in writing Mr. Shaw's name in any way?

A. No, sir.

Q. Whether attention was called to it by Shaw or anybody that you had so written it down?

A. No, sir.

Q. Is there any alteration there after its first writing by you?

A. No, sir.

Q. (Mr. Nutter again tendered the report of the October business sent to the Relief Company in November before the fire, but it was objected to and excluded.)

Cross-examination:

Q. (By Mr. Hodges.) When did you leave Mr. Dow's employment?

170 A. Well, it was about the 15th or 18th. I cannot say exactly.

Q. Of October?

A. Of November.

Q. Almost immediately after that entry was made, or do you mean this last October?

A. I mean the October following the fire.

Q. The fire took place in November?

A. Well, I mean November.

Q. You mean you left on the 15th of the month of the fire?

A. Of the fire, yes, sir.

Q. Have you been engaged in the insurance business since then?

A. Yes, sir; at Mr. Charles S. Hane's, on Devonshire st.

Q. Did you ever hold any communication with anybody at Mr. Hane's office on the subject of this entry?

A. This matter?

Q. Yes, sir.

A. No, sir.

Q. You never spoke to Mr. Keith about it? Mr. Keith has been a witness; the gentleman sitting over there.

A. No, sir; I never spoke to him about the case in any way.

171 Q. Never said anything to him about the risk being perfectly complete and would be paid on the account being made up?

A. No, sir.

Q. Are you positive about that?

A. I am very positive.

Q. Did you ever have any written communication from Mr. Keith? I don't ask what it was.

A. I don't remember that I ever had any communication with Mr. Keith.

Q. Do you remember the latter part of December, a year ago?

A. Yes, sir.

Q. And in January, about the middle, a year ago, communicating to Mr. Keith that you would call upon him at a certain time?

A. No, sir.

Q. At 42 Court st.?

A. No, sir; not that I recollect.

Q. Did you never speak with Mr. Keith upon this subject? I wish you would go over your recollection as well as you can about it, that we may be accurate.

A. I will recall it as well as I can, but I don't remember ever having conversed with Mr. Keith about it.

Q. You see Mr. Keith there? (Pointing him out.)

172 A. Yes.

Q. Now, to be more specific, at Mr. Dow's office, on the 15th November, a few days after the fire, did you see Mr. Keith and speak with him upon this subject?

A. Well, I cannot say whether I saw him on the 15th.

Q. Well, I understood you to say you had never seen him?

A. No, no; I did not say I had never seen him; I had never had any conversation with him as to this loss, except his coming in to ask for a blank brief, which I gave him.

Q. Now, on the 15th day of November, or within one or two days of that time, did you see Mr. Keith, and you yourself explain to him, describe to him, that memorandum, or show it to him?

A. Well, I cannot say, I am sure.

Q. You cannot say whether you did or not?
A. No, sir.
Q. Keep your mind upon the same time, the 15th or 16th Nov., and at Mr. Dow's office; did you tell Mr. Keith specifically that the insurance was perfect, and that the risk would be paid when the proof of loss was made?
173 A. No, sir; I did not.
Q. Did you tell him anything of that kind?
A. No, sir; I did not.
Q. Did you tell him that the insurance—I do not mean using words that shall be absolutely accurate, I mean substantially—did you give him to understand substantially that that insurance was good, and that he should proceed to prove the loss?
A. No, sir.
Q. Did you furnish him a blank upon which to make out the proof of loss?
A. I think quite likely that I did.
Q. Look at that paper and see if you see your handwriting upon it. [Handing witness the proof of loss.]
A. Yes.
(The writing of the witness upon it was shown to the jury.)
Q. Now, sir, have you any recollection of the circumstances under which you wrote that and passed that paper from your hands?
A. No, sir; I have not the slightest.
Q. If these words were not in your handwriting, would you remember anything about it? I mean about this particular document,
174 this particular paper.
A. No, sir; not about that particular paper.
Q. Then, except for that, would you remember that you furnished that paper to Mr. Keith or the blank attaches, to make proof?
A. We had in our office about two or three hundred of those proofs lying on the office table, and I was filling them up for several different companies. I may have left a blank or I might have folded a blank, I do not know; that is my handwriting.
Q. Did you have any proofs of loss on the 15th of November of this company—any blanks like this?
A. I cannot say that I had.
Q. Did not you have to wait until about the 22nd of November before you had these proofs and these blanks?
A. Yes; we did have to wait.
Q. Now, when Mr. Keith first called upon you, did you tell him that you had not proofs, and that he should come in two or three days to get it?
A. I cannot say that I did say so.
Q. Nor that you did not?
A. Nor that I did not.
175 Q. Then, as to furnishing Mr. Keith that paper, you really know nothing about it except that you see your handwriting in this place. Now, coming again to about the middle of January, did you then see Mr. Keith at Mr. Lane's office?
A. Mr. Keith came into Mr. Lane's office, I think, and saw me.
Q. You now remember his coming in?
A. I said that he came in and saw me.
Q. Did you then promise to go to his office in regard to this?
A. I do not know that I refused to go.
Q. That was not the question; did you promise to go?

A. I cannot make sure that I did.
Q. Can you be sure that you did not?
A. No, sir.
Q. Did you go to his office.
A. No, sir.
Q. I ask the same question concerning the latter week in December. Did you see Mr. Keith the latter week in December, and on going out of Mr. Lane's office did you then promise to go there?
A. I cannot say that I saw him the last week in December, but I saw Mr. Keith.
176 Q. Then, say generally, did you at any time promise to call on Mr. Keith on this subject?
A. Well, I had a general conversation with him, but I never promised to call at his office or elsewhere.
Q. Never fixed a time to call at his office?
A. No, sir.
Q. Now, in a conversation you had with Mr. Keith, do you remember telling him that that insurance was perfectly good as a contract of insurance?
A. No, sir.
Q. Did you ever tell Mr. Keith what you have told here, that it was an open policy and imperfect?
A. So far as that matter is concerned, I never had any conversation with him about it.
Q. Did you not recommend him to make proof of loss?
A. Yes; I suppose I did, the same as I did everybody else.
Q. Did not you refer him to Mr. Gilbert, the adjuster?
A. No, sir.
Q. Did not?
A. Did not.
177 Q. Where did you suppose he was going to submit his proof of loss to the company; in New York?
A. As to making proof, he could make it at any time.
Q. But to submit it; did not you recommend him to submit it to Mr. Gilbert, the adjuster?
A. I did not.
Q. That you swear to?
A. I swear to it.
Q. When Mr. Shaw came into your office on the 15th of October, did you know him?
A. Yes, sir.
Q. You did know him?
A. Yes.
Q. When he first came in?
A. You refer to this day here?
Q. I refer now to the 15th of October.
A. Yes, sir.
Q. You did know him? Do you recollect what time of day it was when he came in?
A. No, sir.
Q. Do you recollect his meeting Mr. Dow as he came in at the door?
A. No, sir.
Q. Might he not have met Mr. Dow as he came in at the door?
A. Yes; he might—they might anything—he might have met him.

178 Q. Do you remember a man sitting near the desk when he came in—a man that you were then speaking to?

A. No, sir.

Q. You do not remember the circumstances?

A. I do not remember the fact.

Q. And it might have been so?

A. Yes.

Q. Do you mean to say that you know there was nobody there when he came in?

A. To my knowledge.

Q. When you say to your knowledge, do you mean to your knowledge or recollection?

A. I know that we were alone in our office; I know that there was no person there.

Q. At no time when he and you were there on this day?

A. I know there was no one but Mr. Shaw and myself in our office.

Q. You will swear that Mr. Dow was not in the office when Mr. Shaw came in?

A. I will swear he was not in the office.

Q. And that there was nobody in there when Mr. Shaw came in?

A. Yes, sir.

Q. Who was on the stairs?

179 A. I do not know.

Q. Was there anybody in the office before you began to talk about an open policy?

A. There may have been; when my attention was called to Mr. Shaw there was nobody else in the office.

Q. You know there was nobody there?

A. I know.

Q. Now, will you tell me what the open policy is that you refer to? Mr. Shaw has spoken of an open policy upon cotton, upon which risks were insured from time to time as cotton was placed in the building that the policy covered. Now, did you understand that this was an open policy in the Relief Insurance Company that was to take effect when Mr. Shaw came and showed you that goods were deposited at Ball's?

A. That was the arrangement, or, really, the contract that I made with Mr. Shaw in regard to the ground of the policy of insurance.

Q. If that were the case, why were you not ready to make out that policy and have it ready for him to put the different articles of goods on?

A. I was ready at any time that Mr. Shaw came for it.

180 Q. Did you ever make it up?

A. No, sir.

Q. But why not make it up to have it ready, so that he could put on everything that was to be put on it?

A. We had the same case the night previous, and we were waiting for Mr. Shaw to come in for it.

Q. You kept the policy?

A. Kept the policy; yes; it was in our office.

Q. And when the policy for any part of the goods was cancelled Mr. Shaw came in or sent in to you, didn't he?

A. In the case of the cotton, yes.

Q. Now, do you recollect putting on the back of the policy the times when Mr. Shaw came in and removed this batch of cotton and that batch of cotton?

A. Yes; I remember the fact.

Q. And you attended to that?

A. Yes. I cannot say that I did it all.

Q. Now, if an open policy was agreed upon between you and him, how happened it that the rate was not agreed upon?

A. Why, the rate is fixed at the time of the indorsement.

181 Q. Then the rate in an open policy varies in the different articles that are put on?

A. According to the character of the risks.

Q. This risk was the boots & shoes?

A. Well——

Q. It was to be at 75 Pearl street, Ball's, wasn't it?

A. Yes.

Q. Now, what difference in rate would there be on these articles put into that place? Would not the rate be the same all the way?

A. Yes, the rate would be the same if he fixed it for a year; if for a month or fifteen days, it would be very different.

Q. But here seems to have been entered one month?

A. Well, that is as I explained to you—that our custom is to insure——

Q. Then what do you mean by saying there was no rate agreed upon?

A. How could I fix a rate unless I had something to fix a rate on?

Q. Hadn't you something to fix a rate upon in an open policy 1 month, and on goods insured at such a place?

A. The wording of that policy is just here: I give him a policy

182 on $5,000 worth of goods if he reported to me. He never came and reported to me. If he wanted insurance for $15 or $18.00 he could come and get it, but he never came.

Q. Are you sure you did not fix at the rate of $\frac{60}{100}$ in that case?

A. I am.

Q. You will swear it?

A. I will.

Q. When Mr. Shaw was in your office, either just as he was going out or a little before, didn't you hand him two papers, one concerning this relief company, and another concerning another company?

A. I might have done.

Q. Now turn to the inst. when the memorandum was made; did you make the first figures and letters in that book, or did you have on your desk a paper, perhaps like this, on which in pencil you took down the notes from which you made that entry?

A. Well, I could not answer that.

Q. I mean didn't you first take that down as I might be taking down a thing here and then put it on here?

A. I should not swear that I didn't do so, but I don't suppose

183 that I did; but I should not swear to it.

Q. (By Mr. Nutter.) I understand you to say that the rates on this policy might vary as to the length of time to run?

A. Certainly.

Q. (By Mr. Hodges.) If they were monthly rates that would be fixed, wouldn't it?

A. Yes.

Q. If by the year, at a different price?

A. Yes.

Q. But in no other ways vary?

A. It depends upon the time. If he had it for fifteen days I should charge him short rates of one month for fifteen days.

Q. Under a pro-rata rate?

. I 'hould charge him a rate to be varied by the time the man fixed.

Q. Suppose fifteen days—half a month?

A. Yes, half a month at the short rates per month—two-tenths.

Q. Well, two-tenths for a month, and if you had it in fifteen days you would charge one-tenth?

A. Yes.

Q. (By Mr. Abbott.) On the fifteenth of November, were you in the employ of the Relief Insurance Company or was Mr. Dow in the employ of the Relief Insurance Company?

184 A. No; I was not in his employ.

Q. And Mr. Dow had then ceased to be the agent of the Relief Insurance Company?

A. Yes, sir.

Q. So that, at any time after the fire or ever before, you, as clerk, had nothing to do for Mr. Dow, nor had Mr. Dow anything to do as agent?

A. Nothing.

Q. And as to after the fire, whether you were employed in making up proofs for anybody that might come for the Relief Company or any other co.?

A. Yes; I was making proofs in Mr. Dow's office.

Q. And whether after that time things amongst insurers generally were very much pressed and hurried?

A. Yes, sir; they were.

This closed the testimony for the defendant.

ELIJAH A. SHAW recalled:

Q. (By Mr. Hodges.) Mr. Shaw, you have heard the last witness testify. I want to know if, upon hearing that, and having your attention particularly called to it, you will now state whether or not Mr. Robinson went into that office with you that day?

185 (Objected to.)

Q. Mr. Shaw, in reference to what you have said and what that witness has said in reference to Mr. Robinson, have you any change to make in your testimony?

A. I have no change to make in my testimony in regard to Mr. Robinson going in.

After considerable discussion Mr. Hodges was allowed to put the following question to witness:

Q. Whether or not, on the 15th October, 1872, the day you have here before spoken of, you went into any other insurance office with Mr. Robinson, and there in his presence talked with any gentleman concerning the insurance of boots & shoes at Mr. Ball's?

A. I went into another office with Mr. Robinson. I did not make any words in regard to insurance, as the agent—Mr. Westgate, agent to the then Mutual—was not in.

LOWELL, J. Why cannot you answer your counsel's question?

A. I went into Mr. Westgate's office, but made no words as to insurance.

Mr. HODGES. My question, Mr. Shaw, is distinct. Did you, on the fifteenth of October, 1872, make any talk with any insurance

186 agent concerning insuring your goods at Pearl st., at Mr. Ball's office, in the presence of Mr. Robinson, except in Mr. Dow's office?

A. No, sir.

Q. Did you on any other day in his presence make any talk with an insurance agent concerning insuring your goods at Mr. Ball's?

A. I did not.

Q. Then when you have heard Mr. Colby's testimony do you desire to change your testimony as given before in any respect?

A. I do not, sir.

Q. That is your handwriting? (Showing witness the proof.)

A. Yes, sir.

Q. Mr. Shaw, when did you sign that paper?

A. I signed it in Jefferson, Texas, on the 25th of November, 1872.

Q. Will you state the circumstances under which that was done, and particularly having reference to the expression, "for the term of one year from the fifteenth day of October?" I call your attention to two facts, and ask you if you can to explain them. First, that the ink is underwritten in pencil, and next, to the fact that it is an insurance of

187 one year from the 15th day of October to the 15th day of October, 1872–'73. State the circumstances under which that was made and whatever explanation you have to make of it.

A. I received that statement blank from Mr. Keith. As I had never had any loss by fire and knew nothing about it whatever, I sent for Mr. Thornton——

Mr. ABBOTT. Who?

A. Mr. Thornton, the agent in Jefferson of the underwriters of New York and various other foreign companies, with whom I did business in the way of insurance, and asked him in regard to making out my proof of loss. He said he would tell me about it, as he had had a good many losses there, and he went through with the document, asked me the questions, and filled out part of it himself and part was filled out by me. In regard to the one-year, I told him when he put that down that the insurance was till the goods were shipped, and I did not think that was the way to put it in. He said it would not make any difference, that the company did not dispute the loss, the fire had occurred, and it would cover the loss whatever it was; and we had considerable talk, but I agreed to let it go in that way.

Q. You then, sir, state that that phrase, "one year," was put

188 in after conference with this expert and upon his counsel?

A. Yes, sir.

Cross-examination:

Q. (By Mr. Abbott.) You did go to another insurance office on the 15th October, did you not?

A. I did.

Q. More than one insurance office?

A. No, sir.

Q. Where was that?

A. On Devonshire st.

Q. Near Water st.?

A. Some distance. It is on Devonshire st.

Q. Towards State?

A. Down the other way.

Q. And before you went to this place of Dow's or afterwards?

A. Before I went to Dow's.

Q. Did you go directly from that office to Dow's?

A. I don't remember in regard to that.

Q. You don't remember whether it was before or after? Which direction did you go to this office of Westgate's, or whatever the name is?

A. I met Robinson, by appointment, at Pearl st.

Q. Well, did you go directly from Pearl st. to that office?

189 A. I could not say as to that. I was getting ready to leave for Texas.

Q. Where did you go from this place where you met? Did you go directly to the insurance company's office or somewhere else?

A. I could not say, for I don't remember.

Q. Well, how soon did you go, after you met, to Dow's office?

A. I met him some time at noon, and it was quite early in the afternoon we went to Dow's.

Q. Then you don't know that you went to Westgate's before you went to Dow's with him?

A. Yes, sir.

Q. Well, did you go directly to Westgate's and from there to Dow's? Did you go by appointment directly from that place of meeting to Westgate's and also to Dow's?

A. I don't think I did; but still I don't remember.

Q. What did you do between; can you recollect anything beyond?

A. No, sir.

Q. Can you recollect transacting any other business before this insurance?

A. No, sir.

Q. After meeting did you separate before going to their insurance offices?

A. No, sir.

Q. How long was you with him?

190 A. All the afternoon. I bought a trunk for him the same day and a cloak.

Q. Do you recollect buying a trunk for him that same day when you went to Dow's and Westgate's about these insurances?

A. I can tell from my book.

Q. Well, sir, any way; I don't care how, if you can recollect it certainly?

A. (After loooking at pocket-book.) No, sir; it was on the day previous.

Q. Then we'll say the trunk aside. What else did you do that day except going to these insurance offices, if anything?

A. I think we went out to the public gardens.

Q. Now, were not you to meet him there for the purpose of going to these insurance offices?

A. No, sir; I was to meet him at——

Q. Well, what were you to meet him for?

A. Well, for the sake of seeing him and going round with him.

Q. To do what?

A. Well, to see the sights. He is a stranger in Boston.

Q. Well, he had been here some months, hadn't he?

A. Yes.

191 Q. Can you give any other account of your meeting him there except that you were going to show him the sights of Boston?

A. I made an agreement with him to meet me at 69 Pearl st. I met him there, and we went from there to get insurance. We went from there to Westgate's. I cannot say how long after we went to Dow's, but it was not long after.

Q. Now, I ask you whether you had any other reason for the appointment with Robinson at this place in Pearl street than the reason you gave a little while ago, to show him the sights about Boston?

A. My reason for meeting him was, as I say, to do what errands we wanted before I went.

Q. You didn't do any errands that day, did you?

A. I think we looked for a cloak for his mother.

Q. Well, then, seeing the sights was nothing to do with it?

A. Well, that was an every-day thing with us.

Q. Well, can you state the specific purpose for which you made the appointment to meet? What was the purpose of that appointment specifically?

A. I don't know that there was any specific purpose.

192 Q. Do you mean, sir, that you made an appointment to meet him at a particular place and time without any object whatever?

A. We often made an appointment.

Q. But at that time, is your recollection that you made an appointment to meet him at a particular time and place without any particular purpose?

A. Nothing more than as company.

Q. Now, is it at last in your mind that you went directly to Westgate's?

A. I think we went to Westgate's.

Q. You went directly to Westgate's?

A. I could not say that we did; my impression is that we did.

Q. Is your mind now fully made up?

A. My impression is that we did.

Q. You don't recollect going anywhere else before, do you?

A. No, but we might have done.

Q. And how far is this place on Pearl street from Washington street, or how far was it from Devonshire street?

A. Mr. Dow's?

Q. Yes.

193 A. Perhaps fifty doors; I don't know how far, I'm sure.

Q. You didn't go on to Washington street, did you, to get there?

A. No.

Q. Now, sir, you went to get this insurance at this Westgate's?

A. We didn't go to get it; we went to see Westgate in regard to it.

Q. Well, you went to see about this insurance—the insurance of these goods?

A. I don't know.

Q. Don't you know, sir, that you went to see about the insurance of those goods?

A. I think it was.

Q. And you didn't see him, Westgate?

A. I didn't see him.

Q. Was there anybody there?

A. There was a young man there and I told him I couldn't wait, and went away.

Q. And you left immediately?

A. Yes, sir.

Q. Where did you go when you left?

A. I couldn't say.

Q. Have you any recollection of anything that happened until you went to Dow's office?

A. No, sir; I couldn't say where we went to; to the market or not.

194 Q. Did you have any business at the market that day?

A. No more business than to see the market.

Q. Well, do you recollect, between the time of going into Westgate's about your insurance and not finding Westgate there so you could not get insurance, whether you went up to the market and then came back to Dow's about the insurance?

A. I could not tell.

Q. Now, don't you know this as well as you know anything, that starting to Westgate's and not finding him, you went from Westgate's to Dow's directly about the same subject?

A. No, sir; I don't recollect it.

Q. You don't recollect it?

A. No, sir; I don't.

Q. You can't recollect it, can you?

A. There is nothing that takes my mind.

Q. You recollect no circumstances whatever?

A. No, sir.

Q. And you know of no reason why, when you started off on your round about insurance and went to one person and found him absent, you shouldn't go direct to another person about the same business?

195 A. No particular reason, but I don't know whether I did go anywhere else or not.

Q. And you never went anywhere else about your insurance?

A. No, sir.

Q. Nor ever went anywhere else on account of your insurance before or after?

A. No, sir.

Q. Now, can you tell which way you went down to Dow's?

A. No, sir.

Q. Can you give us any idea of the interval of time between your leaving Westgate's and getting into Dow's?

A. I could not; I know I met him quite early in the afternoon.

Q. Well, you met him at noon, and it was quite early in the afternoon that you got through the business?

A. Yes.

Q. There is no doubt about that?

A. I think it was.

Q. And there is no doubt you met him about noon?

A. About noon.

Q. That is your handwriting isn't it, (handing him a paper.)

196 A. Yes; that in ink is my handwriting.

Q. The ink part is your handwriting?

A. Yes; that is my handwriting.

Mr. HODGES. What is it you show him?

Mr. ABBOTT. I show him what you did. (To witness.) So that, having your attention called to it, you filled it up in ink and swore to it?

A. Yes.

Q. And you told Thornton at that time that the goods were really insured until they were shipped?

A. I explained the circumstances.

Q. You told him that, didn't you, that the goods were insured until shipped?

A. I explained the whole thing to him.

Q. Didn't you tell him that, sir?

A. In the way you put it, I did not.

Q. Didn't you swear here, in answer to the counsel on the other side, that you told him the goods were insured until shipped?

Mr. HODGES. I crave judgment, your honor. The witness has five

times commenced to answer the question. If he did use the words put into his mouth by the counsel, and other words in explanation, it
197 is his privilege.

Mr. ABBOTT. I put that question, your honor, on oath, whether he did not recollect that he made that answer precisely, "that he told Thornton they were insured until shipped, and not for a year."

WITNESS. I never said they were insured for a year.

Q. Upon your oath, sir, didn't you say you told him the goods were insured until shipped?

A. Well——

Q. Didn't you say it, sir?

A. In my other testimony?

Q. In answer to Brother Hodges.

A. I can't say but I did.

Q. Did you?

A. Without any qualifications, I don't know that I did; I explained to him just what I said to Mr. Colby, that they were to be insured for one month or until shipped.

Q. Now, sir, did you, in answer to Mr. Hodges, mention either Mr. Colby's name or one month?

A. I didn't mention Mr. Colby's name or one month; I said that I explained to him the circumstances of the insurance, the
198 agreement that I made, and told him that it was not for a year, but to cover the goods until they were shipped.

Q. Cover the goods until they were shipped; did you say anything else, sir, than that you had told him the goods were insured until shipped?

A. I told him that the goods were insured until shipped.

Q. But didn't you say just now that you didn't tell Mr. Hodges that?

A. Well, if I didn't I intended to.

Q. Do you mean to say that you told Thornton it was not true these goods were insured for a year, but that they were insured for a month or until shipped?

A. Yes, sir.

Q. And you say that Thornton, a magistrate——

WITNESS, (interrupting.) No, sir; an insurance-agent.

Q. You say that Thornton persisted in saying that, although you told him it was not for a year, and a year had nothing to do with it—he persisted in putting it in a year, and you swore to it as a year?

A. Yes, sir.

199 Q. Although it was not true?

A. Well, I suppose, if I had realized it as you put it now I shouldn't have done it.

Q. Well, how long do you now put it they were insured?

A. I told Colby that I wanted the goods insured from that time until shipped, and it was his idea putting it one month.

Q. Well, you told this Thornton that the contract of insurance was that the goods were insured one month or until they were shipped?

A. Yes, sir.

Q. And that was the contract made?

A. That was the contract, as I understood it.

Q. That was the only contract you ever made?

A. Yes, sir.

Q. Insured one month or until shipped?

A. Yes, sir.

Redirect:

Q. By Mr. HODGES. One word, sir. Taking up the cross-examination of the counsel for the defendant at this point, you are inquired: "Did you not say that the goods were insured until they were shipped? Did you not answer Mr. Hodges that you told Mr. Thornton the goods were insured till they were shipped?" and in response to that you hesitated. Now, I ask you, sir, if I should ask you to make an explanation of that, if your language was not this: "I told Mr. Thornton the whole circumstances of my contract with the insurance-agent; explained the whole to him; and that the goods were insured until they were shipped; and he said, 'Put it in one year.'"

A. Yes.

Mr. ABBOTT. That I object to; I never heard a question put in that way.

Mr. HODGES. Well, we have had a great many new things in this trial.

LOWELL, J. It is new; but what is the objection?

Mr. ABBOTT. Well, it is directly putting words into the witness's mouth.

LOWELL, J. Well, you put that question and insisted upon a categorical answer, and now Brother Hodges does the same.

Mr. ABBOTT. I don't object to his asking the witness in any form what he did say, but I suppose that the ordinary rule in the peculiar position this is in at the present time would apply that you could not put into the witness's mouth, "Now, did you say this or that."

LOWELL, J. I doubt the propriety of doing it at any time.

Mr. HODGES. I say you can put it in re-examination.

JAMES M. KEITH recalled.

Q. (By Mr. Hodges.) Mr. Keith, you have heard the testimony of Mr. Colby. I call your attention to the interview that he was enquired about, and ask you if you have had any conversation with him upon the subject of this insurance that we are speaking of, and if in the course of it he said anything to you concerning the soundness, the validity of that insurance, and, if so, what?

A. On the morning of the 15th November I found a telegraphic dispatch from Mr. Shaw on my table when I got into my office early in the morning, and I went immediately to Mr. Dow's office, 15 Water street, and found Mr. Colby there making the fire. It was quite early in the morning, and I proceeded at once to ask him in regard to Mr. Shaw's insurance. He said that he was insured for $8,000 in the Manufacturers' Company, and that had failed and was good for nothing. He said he was insured in the Relief of New York for $5,000, on the stock of goods at 75 Pearl street, at Mr. Ball's, and that contract of insurance was good, or would be paid as soon as proof was made, and I therefore telegraphed to Mr. Shaw at that time to that effect; I then asked him if he had any blank proofs of loss in the office at that time; he said he had not, but if I would call in in a few days he would have some then printed; I called in a few days, and he then presented me with a blank form of loss, and in order that there should be no mistake as to the form of the proof, I requested him to write in the name of the company and the time when the fire occurred, and those two facts he did write in at that time. (The proof was here given to witness.) He wrote in on the first page here the words, "Relief of New York," and then turned over on the second page and

wrote in the date when the fire occurred, the 9th and 10th November, 1872, and that identical blank I forwarded to Mr. Shaw, and a letter to the effect that he would make oath to the statement, and annex to the statement a schedule of the loss he had sustained, and this schedule was attached to it, and these figures in the margin.

Mr. ABBOTT. I don't see that this is of any consequence.

Mr. HODGES. At the time that he told you that the insurance was good did you see this book?

A. He took the book and made his statements from the book. I didn't examine the book.

Q. Is that the book? (Referring to the entry-book.)

A. I can't say; it was a book about this size.

Q. But at that time he told you distinctly that the insurance was good and would be paid on making proof of loss?

A. Yes, sir; and I telegraphed that to Mr. Shaw. I had some fur-
204 ther conversation with Mr. Colby in regard to this loss. Until after I had received this letter from Mr. Colby after these proofs had been returned to me, and I had received the letter from Mr. Gilbert, then that was the first instruction I had that there was a dispute as to the fact of insurance; I then called on Mr. Dow, and after calling on Mr. Dow I called on Mr. Colby. I called on Mr. Colby on the 24th January, and he agreed to call and see me at 2 p. m. On the 25th, as he had not called, I wrote him and requested him to call between 10 and 11, at my office. If it is proper to state what the messenger said from him I will state it.

Mr. HODGES. We desire it to be stated.

(Objected to by Mr. Abbott and excluded.)

Witness continued: I called several times upon him to find what the facts were in regard to the dispute.

Q. Did he ever call upon you?

A. He did not.

Q. Did you see him again after that time when he promised to call on the 22nd.

A. I don't think I ever did see him after that.

Q. You called and left messages?

A. Yes.

205 EXHIBIT E.

Copy of entry made by Colby on books.

			Amount.	Rate.	Amt. of premium.	
Relief..	E. A. Shaw.	[Oct. 15.	5000.]			Boots & shoes. Bk. store 75 Pearl st. [1mo.] Call on H. A. Ball.

A true record. Attest:

JOHN G. STETSON, *Clerk.*

206 UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and of all proceedings in the cause of Elijah A. Shaw v. The Relief Fire-Insurance Company, in said circuit court determined.

In testimony whereof I hereunto set my hand and affix the seal o, said circuit court, at Boston, in said district, this tenth day of Octoberf in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

[SEAL.] JNO. G. STETSON, *Clerk.*

207 Know all men by these presents that we, the Relief Fire-Insurance Company of New York as principal, and E. W. Dennison and Albert Metcalf, both of Boston, in the District of Massachusetts, as surities, are held and firmly bound unto Elijah A. Shaw, of Boston, in the district of Massachusetts, in the full and just sum of seven thousand dollars, to be paid to the said Shaw, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated the thirtieth day of September, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately, at a circuit court of the United States, held in Boston, within and for the district of Massachusetts, in a suit depending in said court between said Elijah A. Shaw, plaintiff, and said Relief Fire-Insurance Company of New York, defendant, judgment was rendered against the said Relief Fire-Insurance Company, and the said Relief Fire-Insurance Company having procured a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Shaw, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Relief Fire-Insurance Company shall prosecute its said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

J. H. PINKNEY, [L. S.]
Prest. Relief Fire-Ins. Co.
E. W. DENNISON. [L. S.]
ALBERT METCALF. [L. S.]

Signed, sealed, and delivered, in presence of—

Approved:
JOHN LOWELL,
District Judge.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond; which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

(Indorsement on cover:) No. 256. The Relief Fire-Insurance Company of New York, plaintiff in error, vs. Elijah A. Shaw. Massachusetts C. C. U. S. Filed 9th December, 1874.

Supreme Court of the United States,

OCTOBER TERM, 1876.

THE

RELIEF FIRE INSURANCE COMPANY OF NEW YORK,

PLAINTIFF IN ERROR,

vs.

ELIJAH A. SHAW,

DEFENDANT IN ERROR.

WRIT OF ERROR FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE PLAINTIFF IN ERROR.

BOSTON:
ALFRED MUDGE & SON, PRINTERS,
34 SCHOOL STREET.
1877.

Supreme Court of the United States.

No. 256. October Term, A. D. 1876.

THE RELIEF FIRE INSURANCE COMPANY, OF NEW YORK, *Plaintiffs in Error*,

v.

ELIJAH A. SHAW.

BRIEF FOR THE PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error from the Circuit Court for the district of Massachustts, in which the plaintiffs in error were the defendants in the original suit.

The action was commenced in the Supreme Judicial Court of the Commonwealth of Massachusetts and removed therefrom to the Circuit Court, under the Acts of Congress.

The case was tried in the Circuit Court before a jury at the October term, 1873, thereof, and a verdict for $5,241 rendered for the plaintiffs under the rulings of the Court.

It is an action of contract. The case was tried upon the plaintiffs' amended declaration alone. (Report, p. 6, top of page. This appears also from the exceptions, Report, p. 7.)

The declaration alleges that the defendant insurance company agreed to insure the said Shaw "in consideration of a premium *at the rate of sixty one-hundredths per cent per*

annum," which the said Shaw promised to pay on demand, against loss or damage by fire, to the amount of .$5,000, *for the period of one month from the fifteenth day of October*, 1872, on said Shaw's stock of boots, etc., contained in a brick store, etc., and that a fire occurred on the 9th and 10th November, 1872, which destroyed the merchandise insured.

The answer of the insurance company denies that it ever made any agreement with the said Shaw whereby it agreed to insure him against losses to the amount of $5,000, or any other amount, for the period of one month from Oct. 15, 1872, or for any other period, and denies that any such contract as that alleged in the declaration was ever made or entered into by it.

Rep., p. 5.

The amended declaration does not allege that there was any written policy or contract of insurance, and at the trial it was not claimed that any such policy or contract in writing was ever made, but the plaintiffs' case was rested upon an oral contract solely.

The declaration is not upon an agreement to make a written policy of insurance, as is the fact in most cases reported, where the question of insurance without any written policy has been passed upon, but alleges simply a contract of insurance, which is not claimed or proved to be in writing.

To prove his case, Shaw, the plaintiff, was put upon the stand, and also one Dow, who was claimed to be the agent of the insurance company in Massachusetts, with whom the contract was made; the charter of the insurance company under the New York statutes was also proven and put in, together with the copies of Dow's appointment as general agent and attorney of the company for Massachusetts, upon whom service of all process in that State could be made; witnesses were also called to prove what was alleged to be

usage or custom in reference to insurance in Boston, but that evidence is not necessary to be considered.

The insurance company, the plaintiffs in error, requested the Court to instruct the jury, as set forth on pages 8 and 9 of the Report, which the Court refused, and gave the instructions set forth on page 9 of the Report. The plaintiffs in error excepted to this refusal to give the instructions asked for, and also to the instructions given, and the exceptions were regularly allowed.

The defendant in error, Shaw, long after the verdict was rendered, viz., on the 11th of March, 1874, moved to file an amended declaration, which was allowed after verdict as of date of bill of exceptions. This motion and amended declaration appear in the

Report, page 6.

This last declaration, filed after verdict, sets forth a different contract from that alleged in the declaration upon which the case was tried and submitted to the jury, so that, if judgment is given thereon, the insurance company will be obliged to pay on a contract of which no notice was given it, until after a verdict had been rendered against it, and in reference to which it never had an opportunity to make any answer or offer any testimony.

THE CLAIM OF THE PLAINTIFF IN ERROR.

The plaintiff in error claims that the Court erred in refusing and giving instructions to the jury, in these particulars: —

First. That the jury should have been instructed that there was no evidence authorizing a jury to find for the plaintiff upon the contract set forth in his declaration.

Second. That there was no evidence to show the defendants (the Insurance Company) had any authority to make a contract of insurance not in writing.

Third. That there was no evidence to show that Dow, the agent by whom the alleged insurance was made, had any authority to make any contract for the defendant company, except in writing, or that he was ever held out to the world as having such authority.

Fourth. That there was no evidence to show that the company's agent, Dow, had any authority from the company to delegate his power to another to make a contract of insurance binding on said company; and that there was no evidence to show that the alleged contract, made with Dow's clerk, was made with his knowledge or approval, or that he subsequently ratified it.

Fifth. That when for the first time the plaintiff, Shaw's counsel, claimed and argued to the jury in his closing address that if they found a contract of insurance different from the one declared on and upon which alone the case had been tried and submitted to the jury, they should find for the plaintiff; and thereupon the defendant company requested the Court to instruct the jury substantially that they must find the contract to have been made as alleged in the plaintiff's declaration, in order to give a verdict for him it was error in the Court to refuse such instruction.

Report, pp. 8 and 9.

The contention of the plaintiff in error is, substantially, that there was no evidence upon which, legally and rightfully, a verdict could be rendered for the defendant in error.

BRIEF FOR THE PLAINTIFFS IN ERROR.

I.

It is admitted that no written contract of insurance was ever made in this case. The sole claim is upon an oral

completed contract of insurance, not upon a contract to make a policy. The allegation, claim and proof is (if there is proof of any contract) that there was a completed contract of insurance made orally, having no reference to any written policy.

Upon the whole case, upon all the evidence, it is submitted,

First. That the plaintiffs in error had no authority to make a contract of insurance except in writing, and

Second. That there is no evidence that Dow, the agent alleged to have made the contract sued on, had any authority to bind the plaintiffs in error by any oral contract.

It is said now that the weight of authority is that a binding oral contract of insurance can be made. If it is so, it is a great misfortune, and tends to introduce the greatest uncertainty into a branch of business in which all, the rich and poor, the prudent and the imprudent, the careful and the careless, are almost equally interested, and which has reference to interests in amount exceeding those of any other, and it might be well claimed of all other branches of business.

If the Statute of Frauds is a wholesome law, if contracts for the sale of any interest in the realty, or not to be performed within the year, or to pay the debt of another, or for the sale of merchandise of more than $50 in value, or in consideration of marriage, or to charge an executor or trustee, are required to be in writing, how much more necessary is it that the contract of insurance should be required to be made with the same formality.

Indeed, from the time insurance of any kind was first heard of, the uniform, universal custom of all nations has sanctioned a written contract only. The word used, "policy," imports a written instrument, and for years nothing but a written contract of insurance was ever heard of or sanc-

tioned, and in England the better opinion now seems to require that the contract should be in writing.

Duer on Ins. 60.
Millar on Ins. 30.
Morgan *v.* Mather, 2 Ves. Jr. p. 18.
Cockerill *v.* Ins. Co., 16 Ohio, 148.

If in this country the authorities are carefully examined, it will be found most of them only go to this extent, viz., that an oral contract for a policy of insurance may be enforced, and not that a completed contract of insurance may be made by parol. Such was the case of The Insurance Co. *v.* Insurance Co., 19 Howard, 318, where the distinction was made between a contract of insurance and one for the making of a policy of insurance.

The Insurance Co. *v.* Ins. Co., 19 Howard, 318.
Sanford *v.* Trust Ins. Co., 11 Paige, 547.
Hamilton *v.* Lycoming Co., 5 Barr. (Pa.) 339.
Constant *v.* The Alleghany Co., 3 Wall. C. C. 313.

Indeed, but few cases can be found where the courts have holden that a contract of insurance can be made orally; the distinction between such contracts and those to make and deliver a policy is clear and substantial and has always been carefully kept in view by both the courts and the text-books writers. Indeed, the decision of this Court in the 19 Howard, 318, was substantially put upon this distinction. So also was the decision by Judge Grier in the 3 Wallace, C. C. Reports. It will be readily seen there are many considerations applying to an oral contract to make a policy which would not apply to a like contract to insure.

But whether an oral contract to insure is generally binding or not, it is not so in this case: —

First. The plaintiff in error is a corporation. It gets all

its power to act from its charter, — it can do nothing and make no contracts not authorized by that instrument; all acts and contracts not so authorized are *ultra vires* and void. By the charter in this case it is provided that "the president, or other officer appointed by the Board of Directors for the purposes aforesaid, *shall be authorized in the name and behalf of the company, and in and by policy of insurance in writing, to be signed by the president or other officer and secretary of the company, to make contracts of insurance with any person or persons, etc.*, upon any property on which this company may lawfully make insurance." (Rep., p. 11, Art. V.)

This provision of the charter was made in pursuance of the general law of New York, which requires it to provide the manner in which the corporate powers shall be exercised.

The provision is as follows: The charter shall set forth "the mode and manner in which the corporate powers granted by this Act" (*i. e.*, the right to insure property against loss by fire) "are to be exercised."

New York Statutes, Chap. 466, Sect. 2, of 1853.

We have in this case, then, the General Statutes of New York requiring the charter to provide for the manner of exercising the right granted, of making insurance against loss by fire, and the charter made in obedience to the mandate of the law, prescribing that the insurance should be made by a written policy.

The only authority given by this charter is to make contracts of insurance in writing; the officers or agents have no other authority to enter into a contract at all.

It is absurd to claim that this article of the charter is only directory, — only points out one way in which the contract should be made, leaving it open to the directors to enter into contracts in any other manner known to the law.

Such a construction would not only be subversive of the

spirit, the meaning of the charter, which clearly is to confine such contracts to those in writing, but it in fact makes the provision itself inoperative and unnecessary, — indeed, to mean nothing. If all ways known to the law of making a contract are left open to the corporation, then this provision that the contract shall be in writing is not only unnecessary, but meaningless.

Generally, when a statute or contract authorizes or provides for the doing of an act, and at the same time prescribes the manner of doing it, it can be done in no other way. This rule of construction is elementary; it applies to all statutes, contracts and instruments. Where a right is conferred or a remedy given by statute, and the manner of asserting it is pointed out, no other way is ever recognized by the courts.

Boston *v.* Shaw, 1 Met. 139.
Hazen *v.* Essex Co., 12 Cush. 475.
Perry *v.* Worcester, 6 Gray, 546.

Now apply this rule of construction to the case at bar. The charter creates the corporation, makes it for the first time an artificial person; it makes its "purpose and business" "by instrument, under seal or otherwise, to make insurance against fire upon certain specified kinds of property" (Report, p. 10, Art. I), and then provides that such insurance shall be made, as we have seen, by "a policy in writing signed by the president and secretary."

The general provision "by instrument, under seal or otherwise to make insurance," if taken alone, would by no means authorize oral contracts of insurcean. The "*or otherwise*" by no means enlarges the meaning of the first part of the sentence by "*instrument, under seal*," so as to permit such contracts not in writing. If so, the words "instrument under seal" would be unnecessary and meaningless, because the "otherwise of itself would include

every possible way of making a *contract.* "*Or otherwise*," taken in its connection, clearly means by any written instrument, and not by an oral agreement, the words "or otherwise" referring to and qualifying the preceding words "instrument, under seal," and not the following words to "make insurance."

To hold that any contract of insurance could be made, not in writing, would be nullifying the charter absolutely, and taking from the stockholders all safeguard against the unauthorized acts of officers and agents.

As well might it be holden that an agent of the plaintiff corporation could make an insurance against the perils of the sea, which would bind it. Such contract is not forbidden in terms; to be sure the charter provides that its business shall be to insure against fire, but it nowhere forbids marine insurance. So it equally provides that certain officers shall be authorized to make contracts of insurance by policies in writing, and does not forbid expressly oral contracts to be made. The argument is no stronger in the one case than in the other.

Nor can any different rule be applicable to the plaintiff in error, because this contract is made, not in New York, where its charter is granted, but in Massachusetts. The laws of the latter State provide that before a foreign insurance company is permitted to do any business in the State, a duly authenticated copy of its charter shall be filed with the Insurance Commissioner, open to the inspection of all.

Gen. Stat. of Mass., Chap. 58, Sect. 71.

This was required undoubtedly that all might know the power to be exercised by a foreign corporation by its charter before making contracts with it.

Such has been the construction put upon a similar provision in a charter by the Supreme Court of Missouri.

Henning *v.* The U. S. Ins. Co., 47 Mo. 430.

An oral contract of insurance by the insurance company under this charter would be clearly *ultra vires*, and being by its terms executory, could not be enforced, a corporation having only the powers and rights conferred by its charter and the laws applying to it.

Pearce *v.* The Railroad Co., 21 Howard, 441.
Bank *v.* Earle, 13 Peters, 519.
Perrine *v.* Railroad Co., 9 How. 172.
Police Jury *v.* Britton, 15 Wall. 566.
Major *v.* Rey, 19 Wall. 468.
Heard *v.* Prov. Ins. Co., 2 Cranch, 127.

II.

But there are other reasons why the contract of insurance must be made in writing. By an examination of all the statutes of Massachusetts and New York, it is plain that no other method of making insurance except by a policy in writing was ever contemplated in either State.

Sect. 13 of Chap. 466 of the Acts of New York for 1853 provides that "every fire and inland navigation company hereafter organized, doing business as a cash stock company (the plaintiff in error is a cash stock company), shall upon the face of its policy in some suitable manner express that such policy is a stock policy," and the like provision is made in reference to mutual companies. It is quite apparent that this provision would be entirely inoperative unless the contract was in writing. In fact, every provision contemplates insurance only by a policy which imports a contract in writing.

Such also is the provision of the General Statutes of Massachusetts, which requires "that every insurance company chartered by another State and its agent doing business in Massachusetts shall have printed in large type the name of

such State, and the kind of office, whether chartered as a mutual or a stock company, upon all policies issued to citizens of this State."

Gen. Stat. of Mass., Chap. 58, Sect. 73.

This provision cannot be complied with if oral contracts of insurance are permitted; indeed, it is utterly inconsistent and irreconcilable with a right to make such contracts.

By a statute of Massachusetts, also, all contracts of insurance must be in writing or the provisions of the law cannot be complied with. Chap. 196, Sect. 1 of the Acts of Massachusetts for 1864 provides as follows: "*In all insurance against loss by fire* hereafter made by companies chartered *or doing business in this Commonwealth*, the conditions of insurance shall be stated in the body of the policy, and neither the application of the insured nor the by-laws of the company shall be considered as a warranty or a part of the contract, except so far as they are incorporated in full into the policy and appear on its face before the signatures of its officers."

This provision expressly applies to *all companies doing business in Massachusetts*, as was the plaintiff in error, and *to all insurances against loss by fire*, and it can only be operative where the insurance is in writing. Its legal effect is the same as would be an express requirement that all insurances should be in writing. The statutes, by requiring that all insurances shall be made in a certain manner, which can only be complied with by such insurances being in writing, in fact requires them to be so made.

It must be carefully borne in mind that this case is not that of an oral contract to make a policy of insurance. No such contract is alleged or offered to be proved; it is an oral contract of insurance or nothing; there is no allegation or claim that a policy was to be made.

Most of the cases where this question of the effect of an oral contract of insurance has been discussed have been cases of a contract to make a policy. The distinction between such a contract and the contract of insurance itself has always been carefully observed. Indeed, Judge Curtis, in giving the opinion of the Court in the case of The Insurance Company *v.* The Insurance Company, 18 Howard, 318, puts the decision on that distinction, and impliedly, if not in terms, holds that while the contract of insurance itself could not be made orally, where the charter or law provided for a written policy, as in this case, that a contract to make such a policy could be made orally.

The same distinction is also established by Mr. Justice Grier in the 3d of Wallace, C. C. Reports, cited above.

III.

But at all events there was no evidence in this case that the agent, Dow, who is alleged to have made the contract in suit, ever had authority to make anything but a written contract, or that he was ever held out to others by his principal as being clothed with such authority to act.

Let all the facts and evidence bearing on this proposition be examined carefully, and such will be found to be the fact.

In the first place the assured, Shaw, puts in the appointment of and power of attorney to Dow, as general agent and attorney under the Massachusetts law, required to be filed with the Insurance Commissioners, which are found in the

Report, pp. 17, 18, 19.

This makes Dow "the general agent and lawful attorney of the company in and for the Commonwealth of Massachusetts, upon whom all lawful processes in any action or proceeding against said company in said Commonwealth may be served in like manner with the same effect as if said com-

pany existed therein." It also contains a stipulation that any lawful process against said company, served on said agent or attorney, shall be of the same legal force and validity as if said company had existed and been duly served with process in said Commonwealth, and that the appointment and authority of the agent and attorney shall continue in force, and shall not be revoked so long as any liability remains outstanding against the company in said Commonwealth, and until another general agent and attorney is duly substituted and appointed.

This appointment was made under the laws of Massachusetts, and has reference only to receiving service of legal process, and none whatever to an agency for the transaction of other business. Such is the only construction to be put on the appointment or power, and gives no authority to do anything else, and so it has always been holden in Massachusetts.

Gen. Stat. of Mass., Chap. 58, Sect. 68.

That section is as follows: —

"Every foreign insurance company before doing business in this State shall in writing appoint a citizen thereof, resident therein, a general agent, upon whom all lawful processes against the company may be served with like effect as if the company existed in this State; and said writing or power of attorney shall stipulate and agree, on the part of the company making the same, that any lawful process against said company, which is served on said general agent, shall be of the same legal force and validity as if served on said company. A copy of the writing, duly certified and authenticated, shall be filed in the office of the Insurance Commissioners, and copies certified by them shall be sufficient evidence. This agency shall be continued while any liability remains outstanding against the company in this State, and the power shall not be revoked until the same power is given to another,

and a like copy filed as aforesaid. Service upon said agent shall be deemed sufficient service upon the principal."

The next section, 69, provides that "the general agent," before any insurance is made by the company, shall give bond in $2,000 conditional that he will accept service of processes against the company. The same section provides that *any agent* of a foreign insurance company doing business in this State shall, before he does any business for the company in the State, give a bond to the treasurer with sureties in the sum of $1,000 conditional that he will, on or before Nov. 15 of each year, make return to the treasurer of the amounts insured by him, the premiums received and the assessments collected during the year, and pay to the treasurer the taxes provided by law.

Taking these two sections together, it is plain that the appointment of "general agent and attorney" to receive service of process of itself gives no power whatever to act for the company as its agent to transact its business and make insurance for it. That agency is not provided for in the appointment of such general agent or attorney, but is left to be created by other means. The law recognizes the difference, and requires different bonds to be given to different officers and for different purposes.

No proof was offered that any bond, required by Sect. 69 from the agent to transact business, had ever been given by Dow.

The appointment, then, of Dow as general agent and attorney had no legal tendency to prove his agency to make insurance.

The whole evidence comes from Dow himself, for Shaw does not claim that he ever had any business with Dow as agent of the plaintiff in error, except in this case, or knew of his acting as its agent. He had obtained, by Dow's agency as a broker, an open policy from another company, and had been introduced by him to the officers of still an-

other company, from whom he (Shaw) obtained another policy. But this case is the only transaction that Shaw ever had with Dow as the agent of the plaintiff in error, or the only one he ever knew of.

The only material facts to show the agency and the extent of it, come from Dow himself. He testifies that he was agent for the company to make insurance; that he received from it polices of insurance in blank, signed by its president and secretary, with power to fill up and issue them upon payment of the agreed premium. (Report, p. 31.) But he expressly testifies that he had no authority from the company to make any insurance for them except on a written policy; and that he never assumed or attempted to make any oral contracts of insurance for the company. (Report, pp. 37, 38.)

This testimony, introduced by the plaintiff Shaw, is not controlled, contradicted or varied, and no attempt is made to do so. Upon the testimony, then, the only evidence of the agency of Dow, is that he was authorized to make insurance for the company by written policies, and not otherwise, and that nothing was ever done by the company or Dow to hold out to others that he was authorized to make insurance in any other manner.

The delivery to him of policies in blank, signed by the president and secretary, undoubtedly gave him full power to fill them up, as he chose to do, and would bind the company to a person to whom he should issue one of them, although filled up in direct violation of his instructions, but it precludes any authority to make an oral contract.

Upon the evidence, Dow had unlimited power to make any written policy over the signatures of the company's president and secretary. But there is absolutely no evidence whatever of his being an agent to make oral contracts of insurance. Indeed, such agency is expressly denied by the uncontradicted testimony.

IV.

There was no evidence in the case authorizing the jury to find that a completed oral contract of insurance was ever made, more especially the contract declared on and submitted to them, and it was the duty of the Court so to have ruled.

The whole evidence on that subject comes from the plaintiff, and Colby, the clerk of the agent Dow, who was called as a witness by the company.

To make a valid contract, by the familiar principles of law, the minds of the contracting parties must agree upon it, and all its material, substantial parts; nothing must be left open for future agreement, but the whole complete contract must be agreed upon, understood and assented to by both parties, or it is not a completed contract in law, one that can be enforced in Court.

Apply this rule to the alleged contract in this case: it is clear from the plaintiff, Shaw's own testimony, that no binding contract was ever completed and agreed upon, the material parts of which were understood by both parties and assented to.

In the first place the premium, the consideration, must be fixed and agreed on by the parties, and not left in uncertainty, not agreed upon, and to be fixed at another time; the premium, the consideration, is as material as any portion of the contract.

The only testimony coming from Shaw is in the Report, pp. 21–26. On p. 21 he says, "I asked him, Colby, what the rate would be for insurance on Pearl Street, and he said he thought it would be sixty-six one hundredths per cent per annum. I told him I understood they were getting insurance as low as fifty one hundredths or one-half per cent on Pearl Street, but he said he thought not, but they would do it at the regular rates. He said insurance companies had a

regular rate, and he would do it at the regular rate, and he took a memorandum of the insurance." On p. 26 he says, "I asked Mr. Colby what the rate would be; he said he supposed the rate would be the same as it was on the cotton warehouses, sixty one hundredths per cent per annum. *Q.* That was per annum you say? *A.* Yes, sir. *Q.* Then the rate you fixed was the rate per annum; that is so, is it not, sir? *A.* I supposed it would be less for a month. *Q.* The rate was a rate per annum? *A.* That was all that was said about it."

Nothing can be clearer; take this testimony of Shaw, with all the inferences that can fairly and legally be drawn from it, that the premium or its rate, the consideration of the insurance, had never been agreed upon, but had been left unsettled. He asks for one rate, the other party demands a different one, and he does not even pretend that the rate was fixed or agreed on, but it was left to be determined at some other time. In his direct examination he says Colby asked sixty-six one hundredths per cent, and in his cross he puts it at sixty one hundredths, and also leaves it uncertain utterly what portion of either the sixty-six one-hundredths or the sixty one-hundredths per cent was to be paid for the time of this insurance. All he says is, that he "supposed it would be less for a month."

But consider this testimony in connection with Colby's, and it becomes certain that no premium was ever fixed on, or indeed any contract ever made. Colby testifies (Report, p. 56) as follows: —

"*Q.* Whether any rate of premium was talked of between you and him that was to be charged? *A.* No." The memorandum made by Colby in Dow's books, in presence of Shaw and before he left the office, which was the only memorandum in writing of the transaction, shows conclusively that no premium was agreed upon, or was understood

to be agreed on, by the parties. It is given in the Report, p. 70, and is as follows: —

			Amount.	Rate.	Amount of Premium.	
Relief,	E. A. Shaw,	Oct. 15,	$5 000 00			Boots & Shoes, Bk. Store, 75 Pearl St. (1 mo.); call on H. A. Ball.

Both the rate and amount of premium is left blank, showing conclusively, as does the testimony of both Shaw and Colby, that the contract was incomplete in this, that the premium had never been agreed on.

The time for which the insurance was made is equally uncertain, and clearly never was agreed upon by both parties; upon it the minds of both parties never met. Again, the whole evidence comes from the assured, Shaw, and Colby, the clerk of Dow, the agent.

Shaw evidently does not himself know whether he agreed upon insurance for one month or for as long as his merchandise should remain in the store on Pearl Street, and from his testimony no one can determine how he himself understood the contract in that regard. His testimony is on pp. 21–27, 64–68. On pp. 21 and 22, he says he told Colby he wanted the goods insured till they were shipped; that Colby replied he had better put in a certain specified time; that he, Shaw, replied, "It would make no difference; he wanted the goods insured until they were shipped, and would order the shippers when the goods were shipped to go, notify and cancel the policy." No reply is made by Colby. On p. 26, on cross-examination, Shaw testifies he said he wanted the goods insured until he shipped them, and that Colby replied it was necessary to put in a more stated time; and further on says it (*i. e.*, the insurance) was settled for a month and longer, if the goods were not shipped.

On p. 27 he says it was his understanding the insurance was to go beyond a month, and that he told Colby he wanted the goods insured till they were shipped. On pp. 64, 67 and 68, he admits that after the loss he made a written notice and proof of loss, signed and swore to it, in which he stated the insurance was for one year. He also says he told the expert under whose advice he made the written notice and proof of loss that the goods were insured until shipped, although he immediately signed and swore to the statement that the insurance was for a year.

Now, take the party's own account of the insurance as testified to by him, two things are quite clear and certain: first, that the minds of the parties never met upon the time the insurance should run, and next that Shaw himself never determined whether he would make the contract for a month or till the goods were shipped.

The testimony of Colby shows conclusively that he never agreed or fixed on any time, but that the time was to be fixed afterwards. On p. 56 of the Report, he says that the agreement between Shaw and himself was for an open policy, and that Shaw was to come in and make the indorsements and fix and pay the premium, which he never did, and that no time was ever spoken of during which the risk was to continue.

We claim, then, with entire confidence, that there was no evidence of any completed contract of insurance submitted to the jury, — indeed, that it appears, affirmatively, that the contract was incomplete in two respects certainly, viz., that the premium was never fixed and agreed on, and that the same was true in reference to the time the policy was to run. In fact, it is apparent that no binding agreement had ever been made, and the Court ought so to have instructed the jury.

V.

But, certainly, there was no evidence *that the only contract sued on and set forth in the declaration*, viz., for insurance for one month, and at the rate of sixty one-hundredths per cent per annum, was ever made.

In the first place, as appears in the references just made to the testimony of Shaw, in regard to the question whether there was any completed contract agreed to, it is very clear that if there was any such contract, it was not for one month, but until the goods were shipped. He testified that he applied for that time, and that was his understanding of the time the insurance was to run.

Of such a contract, no notice had ever been given to the insurance company. A different one was described in the plaintiff's declaration, and the case was tried upon a different contract and so submitted to the jury.

No notice that the plaintiff claimed to recover on a different contract than that described in his declaration was ever given until his counsel, in the closing argument, claimed that the jury should render a verdict for him if they found a contract different from the one declared on, and different from the one upon which the whole trial had been had. To this claim and argument the plaintiffs in error could make no reply; their only safeguard was to do as they did, — to request the Court (Report, p. 8) to instruct the jury if they found the contract to be different from the one set forth in the declaration, to find for the defendant. This the Court declined to do, and declined to instruct them that they must find the contract as alleged in the declaration. Of course, the jury, under such circumstances, would be justified in rendering a verdict for the plaintiff, although they found the contract to be different from the one described in his declaration.

That is, under this action of the Court, the plaintiff is permitted to sue on one contract and recover on a different one.

The motion to amend, and its allowance, after the verdict, does not cure the trouble; the amended count never was before the jury, and no answer ever was made to it, and no trial has ever been had upon it.

In another respect the contract, if one was ever made, upon the whole evidence, was not the one described in the declaration, which was one of insurance, and not one for a policy of insurance,—two entirely distinct and separate contracts. If a contract was ever made it was one for a policy of insurance to be made and delivered.

That the plaintiff Shaw so understood it is plain. He testifies (Report, p. 22), "I told Colby that I should not take the policy, but leave it, as I had my open policy, and notify my shipping agent, when I telegraphed to ship the goods to come in and cancel the policy, and I gave the directions to my shipper to do so." Such testimony, if true, is utterly inconsistent with the contract alleged, viz., a completed contract of insurance, not one for a policy to be made.

The judge so understood the contract evidently, for in his instructions to the jury (Report, p. 9) he says, "The defendants, notwithstanding their charter, had the power to make contracts of insurance, not in writing, like that relied on by the plaintiff, *which looked to a policy to be thereupon issued*" This misled the jury, and authorized them to find a verdict on an entirely distinct and different contract from that declared on.

VI.

It is not claimed, or rather was not at the trial, that there was any evidence to prove authority from the insurance company to their agent Dow to delegate to another the power to make insurance for them.

of it when it was made, and it was never communicated to him, — so that, if the contract as sued on was made at all, it was made solely by Colby, who could not bind the insurance company, and who never communicated it to Dow, so that he could ratify it.

It is confidently claimed that the Court should have instructed the jury as requested by the plaintiffs in error.

The whole case shows clearly the danger, the irretrievable confusion, that always attends an attempt to set up an oral insurance. Does any one suppose, for a moment, that if the month in this case had expired without any further negotiation between the parties and there had been no loss, the insurance company could have recovered a premium of Shaw? Where is there any proof of what it was to be? An attempt to collect it would have been simply ridiculous upon the testimony just as it is given here.

And if the premium could not have been recovered, there can be no recovery in this case.

Again, on all the evidence, can any one believe that here was a completed contract of insurance, with none of the uniform, necessary, and almost universally adopted agreements in reference to proofs of loss? If there is evidence of any contract, it is of one to make a policy, nothing more; but no such contract is declared on. Indeed, the whole testimony merely proves a negotiation in reference to an insurance which was never consummated, and of which nothing further would have been heard if there had been no fire.

The plaintiffs in error provided by their charter for written contracts of insurance alone; they furnished policies in blank to their agent; they never authorized him to make any contract except in writing; and the company or its agent never held out to the world that the agent had any power to contract orally, and he never assumed to do so. The company did everything in its power to prevent the making of any

contract except in writing; and if it is holden liable in this case, it will be impossible for any one engaged in the business of insurance to prevent an agent from making a binding oral contract. Hoffman *v.* Insurance Co., 92, U. S. 161.

J. G. ABBOTT,

For Plaintiff in Error.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1876.

No. 256.

THE RELIEF FIRE INSURANCE CO., OF NEW YORK,

PLAINTIFFS IN ERROR,

vs.

ELIJAH A. SHAW,

DEFENDANT IN ERROR.

BRIEF FOR THE DEFENDANT IN ERROR.

BOSTON:
TOLMAN & WHITE, PRINTERS, 383 WASHINGTON ST.
1877.

Supreme Court of the United States,

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Plaintiffs in Error,

vs.

ELIJAH A. SHAW,

Defendant in Error.

BRIEF FOR THE DEFENDANT IN ERROR.

The record of the case tendered by the Plaintiffs in Error seems defective and justifies or demands correction, viz.:

1. The admission commenced on the bottom of the 7th page and continued to the first period on the 8th page, is erroneously stated. It should read as follows:—"It was admitted by defendant that said Dow was, during the period of his general agency, the only agent of the company in their business in Massachusetts authorized to make insurance on their account."

2. The deposition of one Robinson was read to the jury, Record 28. He was present when the contract declared upon was made and took part in the transaction, Record 22, 24, 25. The contents of that deposition may be assumed to be of importance in establishing the contract and its terms. It is not

made part of the report and if the facts are to be considered this omission is material.

3. On the 44th page of the Record it appears that the agent of the Defendant in Error wrote a letter to the Plaintiff in Error on the 10th of January, 1873, to which the Plaintiff in Error replied on the 25th of the same month. These letters refer to the conduct of the Plaintiff in Error concerning the claim made for this loss. They were put in as evidence before the jury. And they are not contained in this Record.

If the Plaintiff in Error is authorized in any aspect of this case to present her testimony before the jury we submit that an imperfect presentation is calculated to mislead rather than aid the Court. If the proofs upon which the verdict was found are to be here considered these omitted portions are substantial parts, bore their full share of the burthen and must be considered in testing the rectitude of the verdict. We submit that this report of the evidence, so far as it may touch the soundness of the verdict, must be removed from the case. We may hereafter feel at liberty to notice its value in another aspect.

Under the charge of the Court, page 9, the verdict of the jury establishes the following: The Plaintiff in Error made a contract to insure against loss by fire, a stock of boots and shoes owned by the Defendant in Error, to the amount of five thousand dollars for the period of one month from the 15th day of October, 1872, as the same were stored in Boston.

That said goods were destroyed by fire on the 9th of November, and the company had due notice of loss, etc. That said contract was oral, and is the same declared upon in the first amended declaration, page 6.

If upon this Record any question arises it is this: Is the Plaintiff in Error authorized by law to make insurance in Massachusetts against loss by fire by a contract not in writing?

This we believe to be the only question that can arise upon this Record. And upon that question we present the following propositions:

I The contract was made and to be executed in Massachusetts, and must be governed by the laws of that Commonwealth. By the laws of that State such a contract is held to be a valid legal contract.

Sanborn et al. vs. *Firemen's Ins. Co.*, 16 ~~Pick.~~ Grey 448, and cases cited.

II. Such contracts have been held to be good in this Court, in New York and in other States.

Ins. Co. vs. *Ins. Co.*, 19 *How.*, 318.
Ins. Co. vs. *Colt*, 20 *Wall.*, 560.
Post. vs. *Etna Ins. Co.*, 43 *Barb.*, 351.
First B. Church vs. *Brooklyn F. I. Co.*, 19 *N. Y. Rep.*, 305.
Kelly vs. *Commonwealth Ins. Co.*, 10 *Bos.*, 82.
Dayton Ins. Co. vs. *Kelly*, 24 *Ohio*, 345.
N. Eng. Ins. Co. vs. *Robinson*, 25 *Ind.*, 536.
Mobile M. Dock and Ins. Co. vs. *M'Millan*, 31 *Ala.*, 711.
Security F. Ins. Co. vs. *Ky. M. & F. Co.*, 7 *Bush.*, 81.

III. It is claimed that the charter made in pursuance of the statute of New York limits the powers of the company to making insurance only by written policies. This seems an erroneous interpretation of the statute and of the charter, both of which contemplate insurance by every contract known to the law.

1. By chap. 466 of the laws of New York for the year 1853, provision is made for the voluntary association of individuals to form incorporated companies to make insurance against loss by fire and the risks of inland navigation and transporta-

tion. Section 3 reads, "such persons shall file in the office of the Superintendent of the Insurance Department, a declaration, etc., expressing their intention to form a company for the purpose of transacting the business of insurance as expressed in the 1st section which declaration shall also comprise a copy of the charter proposed to be adopted by them, etc."

Section 4 reads, "The charter comprised in said declaration shall set forth the name of the company, the place where the principal office for the transaction of its business shall be located, the mode and manner in which the corporate powers granted by this act are to be exercised; the mode and manner of electing trustees or directors, etc., etc."

These provisions are general and intended to impose upon the corporations the duty of expressing in their charters what class of business, each proposes to do and where it is to be done. It was not designed by the phrase, "mode and manner" in which the corporate powers granted by this act are to be exercised that the charter should set forth how contracts of insurance should be made, how the books should be kept, how the funds should be guarded, or any or all of the details of business confided by necessity to the directors and their employés.

The act was made on the one hand to provide general regulations for the formation of such companies, and on the other to inform the public of the general nature and character of their business. But clearly it could not have been intended to direct that these charters should express all the details of the business to be done or the forms and ceremonies by which it was to be authenticated.

2. The charter filed in pursuance of the foregoing statute is printed on the 10th page of the record. Attention is called to the first article.

Whether the latter part of this article, beginning with the

words, "its purposes and business" was intended to express the mode and manner in which the corporate powers were to be exercised is by no means certain. The company states it to be a declaration of its "purpose and business" and it is not for us to say that it means any more. However that may be, is it not plain that the company thereby announces the design to enter upon the business of making insurance, on the one hand by "instrument under seal" as the highest form of contract, and on the other hand, "*otherwise*," or by different and lower forms of contract, down to the simplest oral agreement, that is, "in a different manner" or "in another way," as the adverb "*otherwise*" is defined in Worcester's dictionary.

b. The Plaintiffs in Error would make "otherwise" an adjective, defining it, for the purpose of their case, to mean "*not under seal*," violating both grammar and dictionary.

c. The interpretation of Plaintiffs in Error would not occur even to the careless reader, but for the comma after "*instrument*," which should be erased, or placed after "*seal*" rather than after "*instrument*."

3. Article Five of the charter prescribes the duties of the President, and in it he is authorized to effect a policy of insurance in writing. This article refers simply to his duties, and has no reference to the corporate powers of the company, or its mode of doing business. *Sanborn et als.* vs. *Firemen's Insurance Company*, 16 *Pick.*, 448, Judge Hoar says, "We cannot think that a provision in the charter of an insurance company authorizing contracts authenticated by the signature of a particular officer, and without any words of restriction, should generally be construed to limit the powers of the company, and to prevent them from making contracts within the ordinary scope of their chartered powers. On the contrary, the phraseology of those statutes respecting the execution of policies should be regarded as consisting simply of enabling words

not restraining the power which they confer to make contracts of which the policies are the evidence."

Judge Curtis in *Insurance Company* vs. *Insurance Company*, 19 *Howard*, 321, referring to a like provision in the Massachusetts Statutes, says, "But we are of opinion that this statute only directs the formal mode of signing policies, and has no application to agreements to make insurance." Views substantially corresponding to the foregoing, are expressed by the Court of New York, in *First Baptist Church* vs. *Brooklyn Fire Ins. Co.*, 18 *Barber, and Dayton Ins. Co.* vs. *Kelly*, 24 *Ohio.*

In *Ins. Co.* vs. *Colt*, 20 *Wal.*, 560, Justice Field says, "The law distinguishes between the preliminary contract to make insurance or issue a policy and the executed contract or policy. And we are not aware that in any case, either by usage or the by-law of any company, or by any judicial decision, it has ever been held essential to the validity of these initial contracts that they should be attested by the officers and seal of the company." The same opinion was expressed by the Court of Kentucky in *The Security F. I. Co. of N. Y.* vs. *The Kentucky N. & F. I. Co.*, 7 *Bush.*, 81. From the foregoing it is not too much to say, that the Courts have treated these provisions in the charters of insurance companies which declare the mode of executing policies as directory only and as having no application to those preliminary contracts in which so large proportion of insurance risks are initiated, and that such initial contract is a binding contract of insurance without writing.

4. Section I, Chap. 196, of the Acts of Massachusetts for 1874, is intended to provide that all the contracts for insurance shall contain all the conditions, and that neither the by-laws nor the application shall be referred to as any part thereof. It does not appear to direct that the policy shall be in writing, and only inferentially does it suggest writing. It would be contrary to the usual directness of legislation, if, by inference

drawn from an act made for a specific and different purpose, the whole course of legislative and judicial authority was to be diverted from its accustomed and time worn channel.

IV. The charge of the Court directed the jury to pass upon the question whether the Plaintiff in Error made the contract declared upon, in the first amended declaration. This is a sufficient answer to the Fifth Exception, but there are other answers equally conclusive. First, the Defendant in Error, by leave of Court, amended his declaration and met the variances (if any existed), between the contract proved and the contract declared upon. To this amendment the Plaintiff in Error took no exception. This is not the time or place to originate an exception to the judicial action of the Court below.

b. It was properly allowed; being a plain case of "redundancy of proof," which, says Starkie, "is immaterial, unless the facts proved, but not alleged, are inconsistent with the allegations." Citing the familiar illustration of an *allegation of a promise to go to Rome, and proof* of a promise not only to go to Rome, *but also to deliver a horse.*

3 *Starkie Ev.*, 1564 (*variance*).
Carter vs. *Telegraph Co.*, 109 *Mass.*, 161.

Gen. Stat. of Massachusetts, Chap. 129, Sec. 41, reads, "at any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable, * * * * either of form or substance, in any process, pleading or proceeding, which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought, or the defendant to make a legal defence."

Revised Stat., U. S., 914.

V. It is difficult to see how the Plaintiff in Error can escape the reproof administered in *Gregg* vs. *Moss*, 14 *Wall.* 564, and

in numerous other cases there referred to, for bringing to this Court this report of the evidence at the trial below. If the report had been necessary to present the questions, no complaint would be made. The company had only to ask the Court to rule that it could not make an oral contract of insurance or could not appoint an agent to make an oral contract of insurance, or could not authorize an agent to give credit for the premiums or any other ruling that would develop any branch of the defence, and upon refusal, to make exception. All rights would thus have been saved and all questions presented here according to the usual course of writs of Error.

To illustrate the embarrassment that results from presenting such a record, we solicit attention to the fourth exception or assignment of error, page 4 of the brief for the plaintiffs in error. And also to the report of the testimony, page 45, where, referring to the entry of the memorandum, the defendant below asked the witness, Dow, "Did you, in any way, ratify this entry as a binding act of the corporation, after you knew it?" Answer: "I ratified it for the time being." 2. "As anything binding that you respected; and if so, why did you not send it on?" Ans. "I did recognize it as binding for the time being, with the understanding that Mr. Shaw was to come in within a few days." Q. "But he did not come in." A. "He did not come in." Again on page 46, question by plaintiff below, "Now when you were asked whether this or that was the reason why you didn't return it to the company, how can you say that, when you didn't know it was returned to the company?" A. "Well, I didn't know it was returned to the company at the time, but I considered it was binding on the company for a short time, and the gentleman said he would come in and fix it, but he didn't come." Q. "Now we'll put a case. Suppose a fire had occurred that night, on the night of the 15th October, what would have been your state-

ment about it?" A. "I don't think I'm competent to answer that question." Q. "Well, that was the very reason why I put the question to you. Whatever judgment you had about it, grew, of course, from your talk with Mr. Colby. All that you know about it was that?" A. "Yes, sir." Q. "And for the time being, you ratified it and considered it binding, provided Mr. Shaw had come in as Mr. Colby indicated?" A. "Yes, sir."

Is this Court to go over the whole of the testimony before the jury, admitting it all to be here which it is not, and pass upon the soundness of the verdict, on the one hand, and the accuracy of the assignments of error on the other? Or will they enforce the rule and call upon the parties to present here questions of law and leave with the jury the questions of fact?

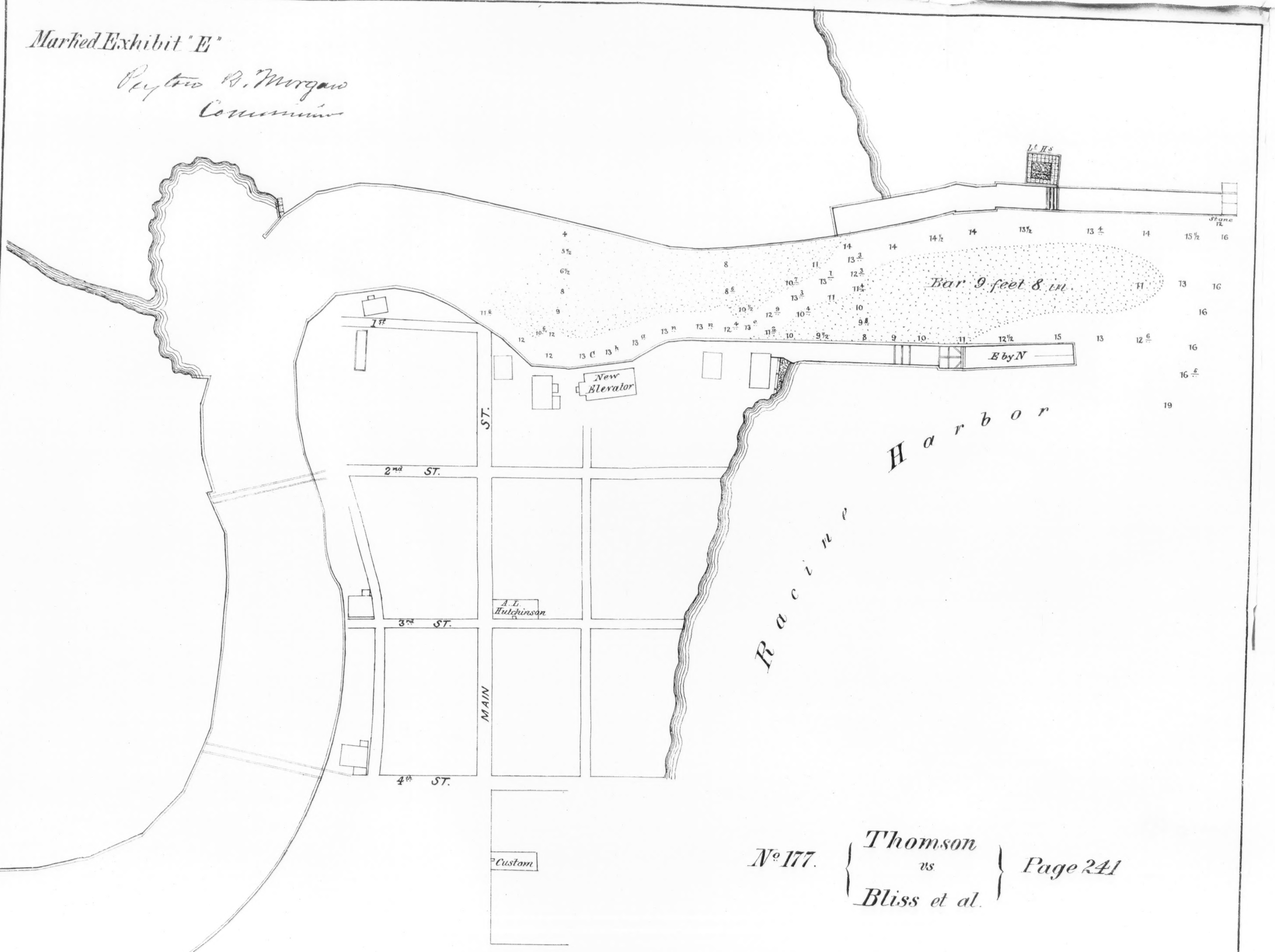
If, the other assignments of Error no more fairly present the evidence than the one above quoted, a writ of Error would be an uncertain mode of bringing before this Court pure questions of law.

VI. We respectfully submit that this bill of exceptions tenders no substantial issue of law, that it gravely contravenes the rules and practice of this Court, is manifestly employed as an instrument to delay justice and postpone judgment, and should be visited with the penalties for such cases provided.

E. F. HODGES.

Marked Exhibit "E"

Peyton B. Morgan
Commissioner



No 177. { Thomson vs Bliss et al. } Page 241

Mr. Lynder
Have traced in ink the extensions made to the Piers since this survey was made, showing their position at the present time

A. Ryg's Hamilton
U.S. Engrs

U. S. HARBOR IMPROVEMENTS — LAKE MICHIGAN

No 177 { Thomson vs. Bliss et al } P. 240.

MAP

showing the position and character
OF THE

REEF

NEAR

RACINE HARBOR, WIS.

surveyed and drawn under the direction of

Brevet Colonel J. B. WHEELER Major of Engrs U.S.A.
by
Wm T. Casgrain
in May
1867

NOTE

The Soundings are expressed in feet and fractions of a foot
The 6 feet curves is indicated thus .....
The 9 feet " " " " ——————
The 12 feet " " " " ——————
The 18 feet " " " " ——————
The horizontal curves on the land are drawn at intervals of 6 feet of perpendicular elevation The (0) Zero of comparison is the Lake Surface, which was 11.75 feet below the door sill of the Light House at the time of the Survey
The true bearing from the Light House to Racine Reef is S 73° 18' 45" E. distance 1⅞ miles

SAVONA

Evelands
Red Brick Ho.
WIND POINT
BRICK YARD
BRICK KILN
ROCKY
Due West ½ mile

C. Q. Erskine
G. D. Fellows
Heath & Dickson
Raymond
Heath & Dickson
SEC. 28
SEC. 27
H. W. Berry
L. White
Noowan
Williams
Erskine
H. W. Berry
Bell
Etall
H. Denton
D. C.
Campbell
D. C. Campbell
Soens
SEC. 33
Fisher
Wells
Essex
Mallen
Kinney
Beck
Enoch
Robert
Brown
Mc Donald
J. H. H.
H. E. Jones
John
Osborn
W. H. Young
W. H. Young
John Bull
North Corporation boundary
SEC. 4
John Bull
J. W. English
English St.
Grand St.
Sand beach
Hill St.

LAKE MICHIGAN

Sand over Clay
Sand & Clay
Sand & Gravel
Sand & Stones
Clay & Stone
Solid Rock
Boulders
Rocky
Stony
Gravel
Sand
Stone
Clay

True Meridian
Mag. Var. 5° 12' 30" East.

N. NE. E. SE. S. SW. W. NW.

CITY OF RACINE

Wells

Kinney

Beck

Enoch Brown — Robert Mc Donald — J.H.H. — H.E.Jones

John Osborn — W.H.Young

W.H.Young

John Bull

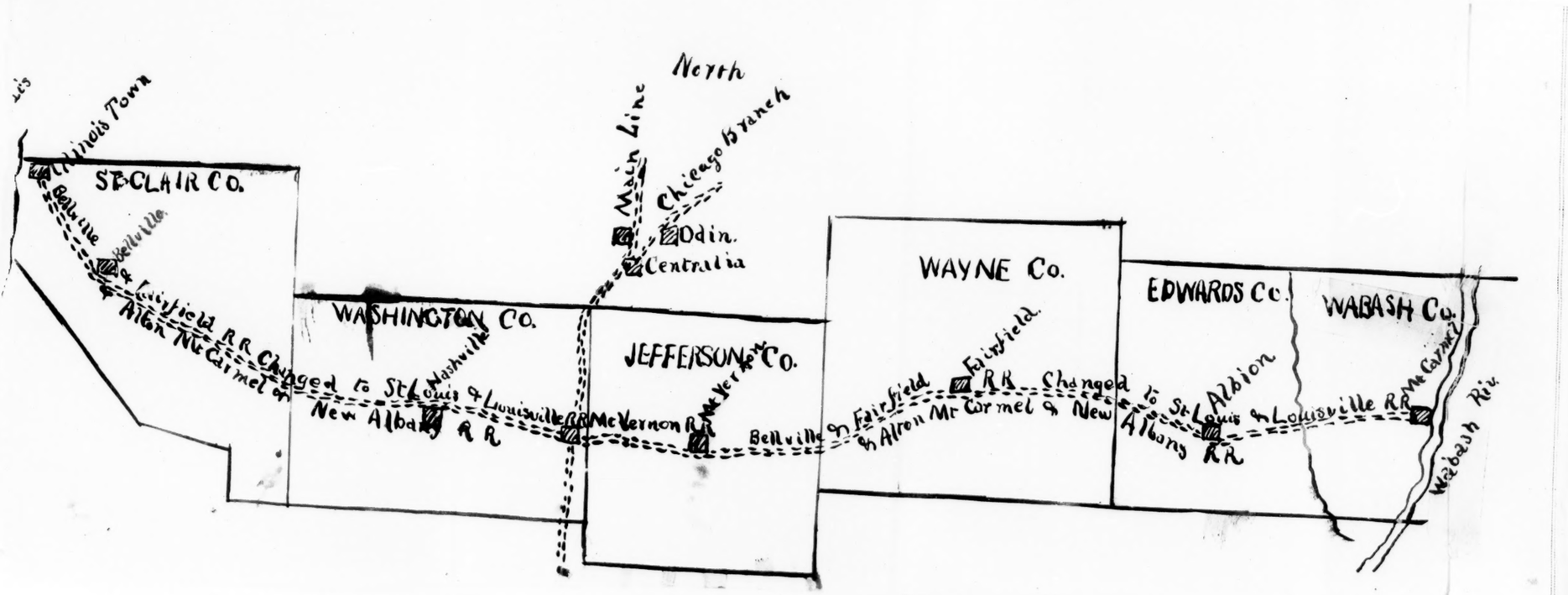
North Corporation boundary

SEC. 4

John Bull

J.W.English

Rogers — St. Clair — Green — English — St. — High — North — Main — South — Sixth — Seventh — Eighth — Ninth — Tenth — Eleventh — Twelfth — Thirteenth — Patrick — Kewaunee — Barker — Hubbard — Hamilton — Prospect — Second — Third — Fourth — Fifth — Sand beach — Foot of Hill — Top of Hill — Ward School — Academy — Court House — Market — Public Parks — St. Patricks Church — MARSH — R. — Gravel — Sand — Clay — Stone — Sand & Clay — Clay & Stone — Sand & Stone — Gravel & Sand — Sand over Clay — Sand & Gravel — Sand & Clay — Sand & Stone — Clay & Sand — Sand & Clay — Sand & Stone — Sand over Clay — Sand & Clay — Sand & Stone — Sand over Clay — Sand & Clay — Sand & Stone — Sand over Clay


Illinois Town
ST CLAIR Co.
Belleville
Belleville
Louisville R.R. Changed to St Louis & Louisville R.R.
Alton Mt Carmel &
New Albany R.R.
Nashville
WASHINGTON Co.
North
Main Line
Chicago Branch
Odin.
Centralia
JEFFERSON Co.
Mt Vernon
Mt Vernon R.R.
Belleville & Fairfield R.R. Changed to St Louis & Louisville R.R.
& Alton Mt Carmel & New Albany R.R.
WAYNE Co.
Fairfield
Fairfield R.R.
EDWARDS Co.
Albion
WABASH Co.
Mt Carmel
Wabash Riv.